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**U.S. Department of Labor**
Office of Administrative Law Judges
211 Main Street - Suite 600
San Francisco, California 94105
(415) 974-0514
FTS B-454-0514

[January 15, 1988]
CASE NO. 87-ERA-21[*]

IN THE MATTER OF

BARBARA POGUE
Complainant

v.

U.S. DEPARTMENT OF THE NAVY
MARE ISLAND NAVAL SHIPYARD
Respondent

Roy Gorman, Esq.
Alan C. Waltner, Esq.
For the Claimant

Joseph Smith, Esq.
Anthony Alfano, Esq.
For the Respondent

BEFORE: ELLIN M. O'SHEA
Administrative Law Judge

## DECISION AND ORDER

*Statement of Case*

This proceeding is brought under the employee protection provisions of four statutes: the Resource Conservation and Recovery Act (RCRA) also known as the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971(a);[1] the Clean Water Act (CWA), or Water

Pollution Control Act (WPCA), 33 U.S.C. § 1367(a);[2] the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; and the

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Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9610(a). These Acts are implemented by regulations designed to protect so-called "whistle-blower" employees from retaliatory or discriminatory actions by their employers, at 29 C.F.R. Part 24. An employee who believes he or she has been discriminated against in violation of these statutes under the regulations must file a complaint within 30 days after the violation occurred.

The complainant on February 20, 1987 through counsel filed a complaint under each of these Acts with the Secretary of Labor. Following an investigation, on March 27, 1987 the Assistant Area Director of the Department's Employee Standards Division issued a determination finding complainant, known to the Department to be a career civilian employee of the U.S. Navy, to be a protected employee engaged in a protected activity within the ambit of all four statutes and that discrimination as defined and prohibited by these statutes was a factor in the actions comprising her complaint:

> "The complainant experienced adverse personnel actions soon after submitting reports identifying violations of the ... environmental impact laws, and by ensuring that upper-level management was informed of such documents."

The Director's March 27, 1987 notice to Shipyard Commander Mann was to the effect these violations were to be abated and specified appropriate relief be provided complainant including transfer to another Mare Island engineering position which held the same promotional potential as her present job, removal from her personnel file, and destruction of Code 106 retaliatory conduct documents, and actual and compensatory damages subject to proof.

The Navy timely appealed this determination, at the same time requested opportunity to submit a Motion to Dismiss under § 24.5 29 C.F.R., formally filed April 17, 1987. Trial had, on April 15, 1987 been set for May 8, 1987. The sole bases for, and issues raised in this Motion, held to be essentially a Motion for Summary judgment, §§ 18.40 - 18.41, 29 C.F.R., were:

> *No. 1*: Whether complainant's reports to the Navy in connection with its hazardous waste management oversight program, the seven internal surveillance reports later described and her letter directed to the Shipyard Commander, constituted protected activities under any of the statutes cited.

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The Navy's argument on basis No. 1 more fully set out in the May 15, 1987 Denial of this Motion incorporated into the record, extensively argued the inapplicability of this Circuit's decision under the Energy Reorganization Act, 42 U.S.C. 5851, *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159; followed in *Kansas Gas & Electric Co. v Brock*, 780 F.2d 1505, to the internal reports complainant contended were protected activities and the basis for the averred reprisals actionable under the statutes here.

The further bases of the Navy's April 17, 1987 Motion were:

> *No. 2*: Whether in alleging discrimination under these statutes by virtue of her contacts with the State of California Department of Health Services Complainant failed to state a cause of action under these whistleblower statutes, the averred reprisals having taken place before her communications with the State of California, with no supervisor knowledge of these averred State communications. No. 3: Whether portions of her complaint were untimely.

After the Navy was afforded opportunity to reply to complainant's Opposition to its Motion, the Navy's Motion was denied on May 15, 1987 as to bases Nos. 1 and 2, granted in part as to No. 3. The parties were advised that only those averred discriminatory acts which occurred since January 20, 1987 as set forth in the Complaint would be the basis for redress in this proceeding under the 29 C.F.R. § 24.3(b) time limits. The claimed redress based on her October 1986 reassignment and removal from her hazardous waste duties was held untimely. Summary judgment as to this fact was granted but the parties were advised that in determining the issues on the post January 20, 1987 actions averred retaliatory, the total picture framing these occurrences including events preceding January 20, 1987, could be presented.

In addition to her February 20, 1987 Complaint's averment of the retaliatory act of denying her requested training in her noise control reassignments, complainant averred as retaliatory the Navy's off-base advertising for a yet-to-be filled Environmental Engineer position in Code 460, a position related to hazardous

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waste and materials for which she had been rated highly qualified. more specifically, the February 20, 1987 Complaint's retaliatory occurrences included:

> -- 1/22/87 Notice of Unsatisfactory Work Performance and 30-Day Period to Correct Performance;
> -- 1/30/87 Proposal to Suspend for three days;
> -- 2/20/87 Official Reprimand.

The Complaint included also generalized retaliatory acts characterized as continuing incidents of acts of intimidation, restriction of activities, imposition of onerous reporting burdens, unofficial and official reprimands and "other conduct."

Following the May 15, 1987 denial of the Navy's Summary judgment Motion the complainant's May 11, 1987 Motion to Amend her February 20, 1987 Complaint was ultimately granted, § 18.5(e) 20 C.F.R., to include as retaliatory actions:

1. failure to award her the Code 460 Environmental Engineer position,
2. 4/13/87 denial of a within-grade increase,
3. her 4/13/87 involuntary job transfer out of Code 106 to Code 250.

Trial initially set to begin May 8, 1987 was, for the reasons reflected in Navy's counsel's May 1, 1987 memorialization of April 29, 1987 conference call, rescheduled to begin June 18, 1987. On the eve of trial, June 15, 1987, in its Pre-Trial Statement the Navy, for the first time, raised the issue the Secretary of Labor lacked jurisdiction under these Acts to adjudge a remedy for federal employees engaged in whistleblowing activities because of the preemptive effect of the Civil Service Reform Act of 1978 (CSRA) 5 U.S.C. § 1101 *et seq*. It is the Navy's position the appropriate forum for redress of Complainant's averred complaints is through the Office of Special Counsel of the Merit, Systems Protection Board.

The timing of the Navy's raising of this vital new significant legal issue given the procedural history in this forum since April 17, 1987,[3] and since February 20, 1987 before the

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Department, was perceived as a major surprise to Complainant's counsel and case, for which full opportunity to research, brief and respond would have to be afforded. See Complainant's incorporated July 13, 1987 memorialization of June 15, 1987 conference call. (See also TR 781-790 denial of Navy's stay request.) It was then determined that trial would proceed June 18, 1987, on all issues, with post-trial opportunity afforded complainant to meet the jurisdiction issue raised June 15, 1987, with reply opportunities to both parties.

Trial scheduled for June 18, 1987 - June 19, 1987 began June 18, 1987 and continued beyond the time originally set based on counsels' best estimates. It continued through july 1, 1987. On June 30, 1987, having concluded the testimony of the Navy witnesses perceived to be determinative of and central to the issues in controversy the undersigned ruled, over the Navy's vigorous objections, to limit further substantive presentation, by both sides, with offers of proof to be submitted. (On the authority of the trial judge to limit trial time see *MCI Communications v. American Tel. & Tel. Co.* 708 F.2d 1081, 1170-1172 (7th Cir. 1983) *cert denied*, 464 U.S. 891.) Offers of Proof from the Navy, identified on counsel's August 21, 1987 submission; as well as Complainant's Offers of Proof were thereafter received, are included in this record.

Complainant submitted her post-trial brief on the jurisdiction issue July 15, 1987. On July 30, 1987 the Navy (Mare Island) filed its Memorandum Regarding Civil Service

Reform Act Remedies Available to Federal Employees as requested; and on July 30, 1987 the Navy's Response Brief (Washington, D.C.) on the jurisdiction issue was also filed. Complainant's Response Brief was filed on August 24, 1987. opportunity for oral argument on all issues but that of jurisdiction was afforded the parties September 21, 1987, in accord with the August 3, 1987 Notice, incorporated. On October 5, 1987 the transcript was received and on October 9, 1987 Navy counsel submitted a Motion to Correct Transcript.[4]

The employee protection provisions of the four statutes at issue are as follows:

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RCRA or Solid Waste Disposal Act, 42 USC § 6971:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

Toxic Substances Control Act, 15 USC § 2622:

> (A) In general--No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) his --
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
> (2) testified or is about to testify in any such proceeding; or
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

Clean Water Act, 33 USC § 1367:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

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CERCLA or Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9610:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

In order to establish her prima facie case under these Acts the complainant must establish

> 1) the Navy, Mare Island, charged with discrimination under the whistleblower provisions of these Acts is an employer subject to these Acts, and
> 2) that she is an employee within these Acts' provisions. The specific issue the Navy has raised in determining these issues is whether by virtue of the Civil Service Reform Act of 1978 (CSRA) a federal employee cannot be held to be an employee subject to these Acts' whistleblower protection provisions, and subject to the jurisdiction of the Department of Labor, because the exclusive statutory remedy for aggrieved federal employees where averred retaliation arises under these environmental protection statutes is the CSRA as amended in 1978.

In order to establish her case, assuming jurisdiction, the complainant must show she engaged in activity protected by these Acts; that her employer knew or had knowledge that she engaged in protected activity; that she was discharged or otherwise discriminated against with respect to her compensation, terms, conditions or privileges of employment; and that the discrimination against her was motivated at least in part by her engagement in protected activity.

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This being the case, the issues and laws in controversy, some initial facts will set forth the background against which both the legal and factual issues are decided.

There is a plethora of dates involved in the factual events of this case. The specific dates set out below may not be absolutely precise when the various witnesses' testimony is compared and viewed against the documentation dates, and the dates set out are to that extent approximate. However the timing and sequence of the events is in total sense as set forth.[5]

Barbara Pogue, the complainant (Pogue), is a graduate nuclear engineer hired as such in 1980 at the GS-5 level by the U.S. Navy at their Norfolk Naval Shipyard. She transferred to the Mare Island Naval Shipyard (herein Shipyard) in August 1982. She has been

promoted during her career as a civilian employee of the Navy, including promotions at Mare Island. She is currently a GS-11. During her Navy career and while at Mare Island Shipyard Pogue has worked under a variety of supervisions in several components at this facility, termed "Codes." In September 1986 she was assigned into Code 106.

Code 106 is the Shipyard's Occupational Safety and Health office, OSHO. At the times pertinent here, its Director was Carroll Tatum (Tatum). Within this Office the occupational Health Technical Division (Code 106.1) was headed by Michael Noble (Noble). Since coming to the Shipyard in 1979 Mr. Noble has worked under Mr. Tatum and assisted him in establishing and developing the occupational Health and Safety Office at the Shipyard. Mr. Noble reports to Mr. Tatum.

Within the Shipyard, the division responsible for the hazardous waste program and the correction of violations of hazardous waste laws is the Energy and Environment Division within the public Works Department, Code 460.

Code 106 is responsible for auditing the Public Works Department (Code 460) and the Production Department (Code 300) to ascertain how well they comply with the Shipyard's hazardous waste rules. The correction and prevention of hazardous waste deficiencies and violations of hazardous waste laws rests with the operational, production Codes, Codes 460 and 300.

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Edgar Refsell, a witness in this proceeding, is an inspector for the State of California's Department of Health Services Toxic Substances Control Division (State). As such he is charged under California law with inspecting facilities that treat, store, and handle hazardous waste. As he said, his inspection responsibilities include any facilities any place, factory, vehicle, that does, or is suspected of storing, handling, treating, disposing of hazardous waste, with the object of protecting health, wildlife and environment. He testified the U.S. EPA has contracted with the State to perform many of the RCRA required inspections.[6] His responsibilities include Mare Island, one of the largest facilities under his responsibility.

In essence Refsell testified that based on the hazardous waste provisions of California law under which he operates, and with the approval of the U.S. Environmental Protection Agency (EPA), Mare island was issued an interim status document (ISD), an interim permit. The RCRA provides for such interim standards for a facility to allow the industry to operate until formal permits for activities covered by the RCRA are issued. While the thrust of Mr. Refsell's testimony as to the basis for his jurisdiction to inspect at Mare Island was California law, he being a State inspector, it is clear his authority is founded also in the RCRA.

Refsell further testified that another unit in his Toxic Substance Control Division has responsibilities under the CERCLA and that while the State Department of Health

Services does not at this time have any responsibilities under the TSCA for Mare Island, the California Code provides that poly-chlorinated bi-phenyls (PCBs) are a regulated hazardous waste chemical and the TSCA enumerates PCBs as such.

Refsell testified that since the Shipyard under its ISD must meet all its requirements as well as comply with the hazardous waste control requirement of State laws and regulations, it is the Shipyard's responsibility to monitor, audit, and ensure that such requirements are met. The clear thrust of Mr. Refsell's testimony, an impressive witness, is that for hazardous waste control or any environment protection legislation to be effective in its purpose the enforcement of such legislation must be assumed by the entities covered and subject to it, by their own internal vigilence, monitoring, inspecting and auditing.

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Refsell performed an inspection at mare Island in August 1984. He also performed an inspection in January 1986 - February 1986, and again April 1987 - May 1987. While these were regularly scheduled inspections, the latter unrelated to Pogue's complaints, it was Refsell's findings on these inspections which were the bases of the State Attorney General's notices of intent to commence enforcement action and the June 11, 1986 civil suit filed against the shipyard.

On April 9, 1985 then Shipyard Commander Scheyder advised the State of California Deputy Attorney General of his responses to the State's notice of intent to commence enforcement action against the Shipyard based on the 1984 State inspection. N-21. One of these responses was to assign to the Shipyard's Occupational Safety and Health office increased independent oversight responsibility for the Shipyard's hazardous waste control program.

A Hazardous Waste Oversight Project Engineer (Rick Thompson of the testimony) was designated and charged with specific responsibilities including weekly inspection walkthroughs with resulting weekly surveillance reports; quarterly assessment of trends identified in walkthroughs which encompassed compliance with federal as well as state, local and Navy hazardous waste regulations. The Environmental Engineer GS-12 Position Description for this HW engineer function indicated that the guidelines the oversight engineer was to use in fulfilling his oversight responsibilities included the RCRA, and the California Hazardous Waste Control Act, 22 CAC, as well as the CERCLA, the TSCA, and the WPCA.

In his July 17, 1985 N-20, notice establishing the hazardous waste oversight program and Code 106's responsibilities, the Commander cited the Shipyard's need to comply with a good deal of hazardous waste legislation promulgated by federal, state, and local governments otherwise civil and criminal actions might be brought.

The Shipyard was advised by the State's Attorney General of his May 29, 1986 Notice of Violation of California Hazardous Waste Control Act and Intent to Commence Enforcement Action. This Notice was based on violations discovered during Refsell's 1986 inspection. This Notice referred to a currently pending lawsuit between the State and the United States for hazardous waste violations found on a previous Mare Island Shipyard inspection,

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into which the violations of the May 29, 1986 Notice would be amended absent timely response. C 306-314.

On June 11, 1986 the State of California by its Deputy Attorney General filed a civil complaint charging Mare Island with a number of RCRA violations. As of June 18, 1987 trial here, a partial consent decree had been signed in this litigation.

While this suit was pending, and sometime prior to his first February 8, 1987 contact with her, Refsell's Division had received a call from Pogue. Refsell testified that over the course of several meetings with her Pogue described her observations, as Mare Island's hazardous waste inspector, of: illegal storage; hazardous waste spills that may have entered the storm sewage system into the north Bay; the disposal of lithium bromide; the PCB contamination of machinery in Mare Island's largest machine shop; the storage of hazardous waste at Mare Island over periods of years, Mare Island personnel's lack of training in hazardous waste or knowledge they were assigned to do the job as well as Shipyard failure of or inadequate solvent recycling.

During the years of his State inspector employment Refsell has had experience with complaints such as Pogue filed and he has found about half credible. He found Pogue's reports clear, concise, valuable and credible and they, in the inspector's judgment, raised questions as to violations of the RCRA; as to the PCB'S, TSCA violations were raised. He testified his Division works with the State's Regional Water Board, this Board advising his Division of hazardous waste problems falling within his Division's jurisdiction. Similarly his Division would advise the State's water Board or the Regional Water Board, the state agencies responsible for administering the WPCA (CWA) as well as the State's laws on water pollution, of information gained during the course of its operations/inspections which the Water Boards may be interested in following up. The May 29, 1986 Notice of Violations also included violations found at the Shipyard by the Regional Water Quality Control Board in a May 1986 inspection report.

Refsell testified that the information Pogue provided the State was relevant to the law suit then pending against Mare Island.

Charles Fisher, a naval architect, and Shipyard employee since 1974, is the President of the International Federation of

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Professional Technical Engineers, Local 25, Mare Island, involved with the Shipyard Union since its charter in about 1978. He testified that in December 1986 Pogue came to him and indicated she anticipated she might have problems in Code 106 because of her December 3, 1986 cover-up letter to the Commander, and she described her concerns as to Shipyard hazardous waste violations.

As a result of concerns arising from the August 1986 Sacramento Bee publication of the civil suit filed against the Shipyard by the State of California based on violations of hazardous waste laws, and Pogue's similar concerns voiced in her December 1986 Union contacts, the Union in late March 1987 filed a grievance against the Shipyard under its contract. Under this contract the Shipyard is to maintain a healthful and safe environment for its employees. The Union's grievance sought to have the Shipyard provide specific information as to actions taken to correct State audit deficiencies as well as to correct the deficiencies reported in Pogue's reports as hazardous waste inspector. On April 4, 1987 the Union met with Tatum and Noble to discuss its concerns. Tatum and Noble indicated they would do what they could to provide the requested information as Fisher testified "after consultation between themselves and whoever else they had to consult with," but since then the Union has been advised no information would be provided until after Pogue's hearing in this forum.

On September 3, 1986 the Shipyard Commander issued the following directive to Tatum on the hazardous waste oversight program.

> Subject: HAZARDOUS WASTE OVERSIGHT
> Ref: (a) NAVSHIPYDMAREINST 5090.2 of 29 Mar 1985 (b) NAVSHIPYDMARENOTE 5090 of 17 Jul 1985[7]
> 1. With the recent inspections/audits by state and federal agencies coupled with the increased public awareness about the handling of hazardous waste, we need to move aggressively to correct deficiencies identified and comply fully with reference (a) and related federal, state and local laws and regulations. I have tasked Code 460 and Code 300 to take appropriate actions to both ensure compliance and to raise the level of awareness of all Mare Island employees on this

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> important issue.
> 2. Critical to the success of this effort is the oversight program, assigned to 106 by reference (b). I recognize the administrative delays in bringing the hazardous waste project engineer on-board and up to speed; however, I consider it essential that the oversight function be active during this critical period. Accordingly, please take immediate action to establish an interim capability within the 106 organization. Reports are to be provided to me with copies to all concerned on a biweekly basis, with the first report due 15 September.

Shortly before receiving the Commander's September 3, 1986 directive, Noble had decided to transfer Pogue, who had sought a Code 106 position, into Code 106. Her transfer into OSHO was effective September 14, 1986 and she was then placed in an Environmental Engineer GS-11 Position Description (PD). Noble testified this was his mistake. He testified he meant to effectuate her transfer as a Mechanical Engineer (PD), and this was so corrected by SF 52 he and Tatum signed early in November 1986, retroactive to September 14, 1936. Pogue was reassigned from HW inspector duties October 28, 1986.

It was Noble's responsibility to implement the Commander's September 3, 1986 directive. Rick Thompson, the hazardous waste (HW) project engineer appointed as a result of the Shipyard Commander's July 17, 1985 notice following his April 9, 1985 advice to the California Deputy Attorney General, had left Shipyard employment sometime in February or March 1986. Thompson's last Surveillance Report, SR No. 14, was dated November 27, 1995. He had issued 14 SRs in the preceding 6-1/2-month period, or since Commander Scheyder's April 9, 1985 advice to the State's Deputy Attorney General. Dr. Cornils of Surveillance Report (SR) No. 15, june 17, 1986, N 54-56, who performed this job on a fill-in basis, had been promoted to Code 460. Noble testified that while recruitment efforts for a new HW oversight engineer had begun in February or March, applicants were not contacted until after Cornils left. Noble and Tatum interviewed Kam Tung in early July, and decided at that time to hire him. Tung's personnel action SF-52 to hire was initiated July 30, 1986. However because of personnel actions needed to meet his salary requirements, Tung could not be brought on board until September 5, 1986. Tung's experience, all in private industry, included a strong background in hazardous waste management. Tung reported to the Shipyard

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September 5, 1986 but was unavailable to Noble and Code 106 until the last week in September, September 29, 1986.

When Noble received the Commander's September 3, 1986 directive, he decided to assign Pogue the HW oversight function of the Commander's directions on a fill-in basis. He telephoned Pogue, then on vacation, to ask if she would come back early. She had no background or training in producing surveillance reports, he testified, and he wanted to explain what was required. Pogue returned and performed the inspection which is the subject of Surveillance Report No. 16.

On September 12, 1986 Tatum transmitted Surveillance Report (SR) No. 16 of September 10, 1986, the first interim report responsive to the Commander's directive, with a statement such reports would be submitted weekly and advice Code 106 had established an interim Hazardous Waste Team to function until the HW Project Engineer reported.

Tatum testified he and legal counsel had advised the Commander there was some deterioriation in field HW compliance due to the absence of the Division's oversight. The Division needed someone to assist in making the HW oversight program visible again, he testified, they wanted to stimulate operational management's attention to getting the problems fixed. He attested Pogue's interim assignment was in accord with this goal, a three-member team approach to be used with one Safety Division person (Hanson), a Monitoring Division person, and Pogue. Tatum advised the Shipyard Commander Pogue had been brought aboard in response to his September 3, 1986 direction. Tatum could not recall if he ever said anything to Pogue in the course of their post September 3, 1986 meetings which she could construe as an indication of a permanent HW assignment. It is this type of hazy answer which raises questions as to just what was said to Pogue about her HW assignment given her Environmental Engineer PD placement.

When Tung reported to Code 106 Pogue was performing the job of HW oversight engineer. He understood she was to be on the job 4-5 weeks to familiarize him with the Shipyard, bring him up to speed and then he would take over the position.

During Pogue's short assignment on the Commander-ordered September 3, 1986 HW oversight project seven SR reports were drawn up. These reports are in part the basis for the December 3, 1986

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cover-up letter she directed to the Shipyard Commander. Pogue was the HW inspector/observer responsible for drawing up the initial reports on these seven audits. All SRs went to the Shipyard Commander as well as to top Shipyard management.

*Surveillance Report: (SRs)*[8]

> *No. 16* of September 10, 1986 dated September 12, 1986 forwarded over Noble's signature
> Shop 71 - Improper disposal of small quantities of flammable liquid wastes in flammable dumpsters. This has been subject of state audits. Area's general appearance poor.

Pogue's original draft on SR #16 related that the ships, force and shops other than Shop 71 used and abused Shop 71's dumpsters.

> *No. 17* of September 19, 1986 dated September 24, 1986 forwarded over Noble's signature
> Building A-195 -
> HW storage area cited on state audit improperly sealed. Written records unavailable. Approved breathing apparatus - cartridge problems noted. Lack of proper labeling. Insufficient identification of unknown HW as state previously reported, employees need training in HW tracking.

*No. 18* of September 26, 1986 dated October 1, 1986 Larson signed for Noble.
1 ) Shop 99 Bldg. 112
57 unlabeled drums of HW in unsecured area in back of bldg. Rusting there for 2 years per personnel.
One drum had hole which, according to shop personnel

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drained into sewer in hot weather. Per shop another drum burst, contents into sewer.
2) PCB Waste Storage Bldg.
Numerous problems noted. Drums stored longer than one year. Missing floor sealant...damaged drum in unsecured area ... bldg. door left open, anyone could enter and tamper with waste.
3) Shop 31
Open drums of HW, unlabeled ... undated.
4) Shop 51
Small leaking drum of HW found dated 1/86. Empty HW drum used as trash container.
*No. 19* of October 3, 1986 dated October 7, 1986 Larson signed for Noble. Tung observed.
1) Mercury HW storage problems observed and reported.
2) Shop 72
Abandoned HW lying spread out near flammable dumpster.
October 9, 1986 HW Oversight Assessment Rept. by Tatum
*No. 20* of October 10, 1986 dated October 17, 1986 Larson signed for Noble.
Shop 56
- Unlabeled lithium bromide drums, one freon drum awaiting pick-up for over 3 months.
- Shop was advised three months ago lithium bromide is considered HW.
Subsequently, Code 460 instructed shop to dump 2 lithium bromide drums a day down industrial waste treatment inlet.

This was the inspection where Pogue observed and discussed the

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disagreement between HW experts including Tung and Code 460 as to whether lithium bromide was a HW.

*No. 21* of October 24, 1986 dated November 21, 1986 Issued in Tung's name.
Shop 38's HW accumulation site:
Unlabeled open HW containers.
HW containers stored over three months.
Shop waiting three months for solvent recovery equipment
they requested to be ordered.

Problems/concerns of Used Solvent Elimination (USE) program at various shops reported.
*No. 22* of October 29, 1986 dated November 21, 1986 issued in Tung's name.
Shop 64
Unlabeled HW, undated or dated over 3 months, stored in unpermitted areas.

Ralph Lee is an Environmental Engineer in the Environmental Engineering Branch of the Shipyard's Public Works Department, Code 460, responsible for hazardous waste management. This civil engineer graduate of the U.S. Air Force Academy has been a Shipyard employee since 1978. Lee accompanied Refsell on his 1987 audit.

Lee's testimony indicated he suggested to Pogue that in following Noble's September 10, 1986 HW audit assignment sheet, which included the paint shop, Shop 71, as a potential audit site, she inspect Shop 71. Noble had noted it had appeared on the State audit inspection report as in violation. The Shop 71 flammable dumpsters were the subject of Pogue's SR No. 16, and its superintendent Balli's subsequent response. The Commander's letter at CX 107, pg. 510 is dated october 31, 1986. Lee, as Code 460, was also involved with Tung on SR No. 20 where on audit the question of whether the lithium bromide encountered in the inspection was in fact a HW was discussed and disputed among the experienced HW personnel, an occurrence contained in SR No. 20.

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Lee testified the Pogue SRs were controversial with shop superintendents, not alone Balli, because they were reporting HW violations. Lee's testimony described the adverse reactions of Shipyard supervisory and shop individuals held responsible by the Shipyard (Commander) for the HW violations Pogue's inspections and SRs reported. This included statements by one which indicated pogue should be discredited and removed from the Hw inspector job, top Production Code management should get through to Tatum on this.

Lee testified that because shop management believed Pogue reported deficiencies which really were not deficiencies they 'were very indignant and they sort of picked up Mr. Balli's spirit or indignance. It became a kind of general feeling." Lee also testified he "heard" Pogue's supervisor was unhappy with Balli's indignance, probably because embarrassed the work centers could come back and say they were right. Lee thought Pogue might have stood watch for the out-of-shop dumpers.

Whether Pogue in her HW reportings was correct and whether what SRs Nos. 16-22 reported were violations under these Acts is not the issue nor determinative here but from what this record presents, in fact, in her inspections/reportings she was doing what her supervisors told her to do. Neither Noble nor Tatum indicated Pogue's SRs as issued reported deficiencies which were not deficiencies. Refsell testified that on Shipyard inspections when HW violations are found it is not uncommon for the work site where found to indicate the HW was left by ships', or non-shop personnel.

After SR No. 22, the last SR with which Pogue was involved, the HW inspections performed by, SRs written and issued by Kam Tung, Project Engineer HW Oversight were:

*No. 23* of December 12, 1986 dated December 30, 1986
*No. 24* of January 16, 1987 dated February 17, 1987
*No. 25* of February 27, 1987 dated April 3, 1987
*No. 26* of April 3, 1987 dated April 9, 1987

Noble testified that after October 29, 1986, Code 106 tried to perform HW oversight activities on a weekly basis. However the Shipyard Commander reassigned Tung to Code 460 to work on preparation of the Shipyard's Part B permit and on the facility's spill contingency plan for the State, and these duties became of higher priority with the Shipyard Commander.

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Tatum, who is an expert in the field of HW oversight reporting, worked with and met Pogue on a regular weekly basis to discuss the HW findings, and in Noble's absence directly dealt with Pogue. When Tung arrived, Tatum's weekly meetings included Pogue and Tung. Tatum opined the quality of the Pogue SRs in issue were adequate to good, his same evaluation of the Tung and Cornilis SRs, Thompson's being excellent.

Tatum testified that after Tung was pulled off HW oversight for the Part B permit work, the priority for getting weekly HW reports out went down. He made a conscious decision to go without the HW reports for this period. He also testified he agreed with Noble that to assign Pogue to noise work was more important than HW oversight. While Tatum clearly indicated he sets the priorities for OSHO, his responses would indicate Noble decided and recommended Pogue's use on noise, Tatum agreed. While Tatum indicated this was "what she was hired for," according to Pogue, she was not so advised in her hiring discussions with Noble. Tatum also testified that while on the HW project he may have indicated to Pogue the possibility of her filling in for Tung, assisting Tung on an on-going basis, he would however also have indicated to her Noble would have to approve. In any event, Noble assigned Pogue to noise work as of October 28, 1986. However the record reflects in the period between October 28, 1986 and the events of December 3, 1986, she had some assigned work on the HW project to perform and complete, she inspected October 29, 1986, SR No. 22.

What occurred in the course of Pogue's assignment to this HW project during her SR inspections and reportings, and particularly the conversations between Pogue and Noble prior to October 28, 1986 and her conversations with Noble and Tatum during the period after her October 28, 1986 removal from hazardous waste activities and reassignment to the noise control project form the basis of a letter she wrote and dispatched to the Shipyard Commander (S.C.) sometime in mid November 1986. This letter alleged her supervisor's "cover-up" of Shipyard hazardous waste violations which she inspected and

reported. In this letter she spoke to the S.C. of her concerns in the belief, as Shipyard publications represent, her communication would at her request be kept anonymous. CX 159, pg. 656. She was, in this letter's allegations, blowing the whistle on what she perceived to be a Code 106 cover-up of environmental protection laws violations, by Noble in particular.

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This "cover-up" letter will be referred to as the "S.C. letter," or "the letter" or "the December 3, 1986 letter" although the date in mid-November 1986 this letter was actually hand delivered to the Commander's Office is not precisely established. It was probably written and delivered around November 17, 1986. It was written before Pogue's knowledge of the November 21, 1986 date of SR No. 21, 22. N48, 453 has a number of dates on it, one indicating the S.C. received it prior to November 28, 1986. It is clear December 2, 1986 was the date Noble through Tatum was first advised of the letter.

These SRs which formed the basis for Pogue's December 3, 1986 "cover-up" letter, as far as is cited to authority or argued here, were not required by any federal regulations implementing any of the whistleblower statutes at issue here. Based on Refsell's testimony such reports are not required by any authority he inspects under. How a facility ensures compliance with the environmental statutes he operates under is their responsibility. However the record in total including Refsell's testimony, Tung's testimony, establishes the function the HW inspector was charged with performing here, the inspection for and reporting of hazardous waste violations albeit for the purpose of correction by the facility were, in subject matter, violations which would fall within the parameters of the RCRA, the CERCLA, the TSCA and the WPCA. Refsell and Tung testified PCBs handling, the subject of SR No. 18 would fall under the TSCA and lithium bromide the subject of SR No. 20 would fall under the WPCA. It was the Shipyard's purpose in setting up the HW Engineer Position Description to have the inspector be guided by and operate under all these Acts specifically recited in his PD when walking through and assessing the Shipyard's compliance.

Pogue's letter to the S.C. asked that it be held in confidence "as you probably know what the consequences to me would be if this letter were made known... I hope you will understand it took a lot for me to write this letter. I will not be in a very good position here if it gets out..." She identified herself as the writer of a majority of SRs recently issued by Code 106, and later indicated a belief the Shipyard Commander may not have received some of the SRs, and a belief "three of our" reports are being held up in Code 106 for one non-technical reason or another. "I am afraid that they may not be sent out to you at all."

She advised the Commander she believed she had been reassigned

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because her reports were controversial and hard-hitting, and her supervisor did not want the HW SRs to be too hard hitting because he might anger somebody. She advised the Commander of much pressure on Code 106 since the surveillance reports had recently started coming out again and her supervisor was removing his signature from the reports because of controversy. She stated a belief a letter had been sent to the Commander saying the surveillance reports would not go out again until the HW Project Engineer came back from his loan to Code 460 and advised the Commander she had volunteered to work overtime to keep the reports going weekly, which was denied. She spoke of her reassignment to other work as leaving the new HW Project Engineer to fend for himself. Additionally she expressed concerns and suggestions to the S.C. on the Shipyard's used solvent elimination program.

On the morning of December 2, 1986 the Shipyard Commander's office called Tatum's office for copies of the last four or five SRs. Pogue, in Tung's absence, took these reports, plus Tung's training audit to the S.C.'s office December 2, 1986.

Noble testified he did not see the S.C. letter until he secured a copy through an EEO counselor. By best recollection this was in January 1986. Tatum testified the S.C. advised him of the general nature of the letter on December 2, 1986 but he did not see the letter until sometime later, by best recollection in January 1986, when the Shipyard's investigating internal control officer showed him the letter. Tatum testified that at his December 2, 1986 meeting with the Shipyard Commander, the Commander was concerned when he got a letter alleging something was being covered up. According to Tatum, the Shipyard Commander specifically requested in this December 2, 1986 conversation that Tatum talk to Pogue and Mike Noble, her supervisor.

Tatum's December 2, 1986 conversation with the S.C. occurred during the course of his regular monthly meeting with the Commander. Tatum testified that immediately on his return to the office he went to Noble's office and informed Noble of the letter, "that there was a letter alleging cover-ups" and he did not discuss the letter's contents because "that's about all I knew at the time." Tatum testified when he talked to Noble he did not know who the person alleged to have covered up was, or what the subject of the cover up was. Tatum testified on direct Noble was upset at

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this advice but it was not until one or two days later he told Tatum he was upset because Pogue had discussed sending a report to the Shipyard Commander concerning environmental or HW problems and Noble had advised her then that any such written reports to the S.C. had to come through the official circuit, through Tatum.

Tatum testified he asked Noble in their December 3, 1986 meeting to try to find out what the nature of Pogue's complaints were and what they needed to do to deal with it but did not get much feedback from Noble because, he thought, Noble had never seen the letter. Tatum did not testify that he asked Noble to talk to Pogue about the letter.

Noble testified Tatum in a brief meeting December 2, 1986 as Tatum was heading out of the office advised him in an "oh by the way" fashion of the S.C. letter and the next day he went to Tatum's office to find out the specifics, if there was anything "we" had to do. Noble testified Tatum did not seem to know much more December 3, 1986 than they had discussed December 2, 1986, so he left Tatum's office and called Pogue in for their December 3, 1986 discussion. In describing what transpired in their December 3, 1986 "letter" conversation, Noble testified Tatum also discussed that there had been some type of dress rehearsal the day before the November 14, 1986 meeting "and that was pretty much it." He told Tatum December 3, 1986 he was angered because on November 14, 1986 he had specifically directed Pogue to prepare a report about her concerns, have the Code 460 person who shared her concern's sign it, and pass it up through the chain-of-command starting with Tung.

On direct, Tatum testified a few days later he mentioned to Pogue he was disappointed that her S.C. letter happened and he could not recall what she said in response. That was pretty much it; there wasn't much conversation. Assumedly this was Tatum's talk with Pogue in response to the Shipyard Commander's request. Tatum did recall telling her in this conversation Noble should not have told her about the letter and he guessed he said that to her because at that point it was almost clear to him that the question of retaliatory action was coming up. Why, because she had written the letter, Noble knew from him the S.C. had gotten such a cover up letter, and "we live in that kind of suspicious world." Tatum's cross-examination testimony indicated there was a far less speculative and very specific basis for Tatum's December 3, 1986 retaliation concern.

After his December 3, 1986 meeting with Tatum, Noble called

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Pogue into his office. At the December 3, 1986 Noble-Pogue meeting, the participants' testimony does not in essence disagree that Noble said and/or did:

> -- he was aware of her S.C. letter, she was insubordinate in sending this letter to the S.C., she failed to follow procedures in not sending this letter through Tung, Noble and Tatum, and he considered her S.C. letter a direct violation of his order.
> -- told her his review of her work to date on her noise control assignments indicated she was deficient, her work performance to date was unsatisfactory.
> -- advised he would approve no Christmas compensatory leave time for her because of her deficient work performance.

Pogue testified that in her December 3, 1986 meeting with Noble when he advised her she was insubordinate in writing the S.C. letter, she told him his December 3, 1986 statements were retaliation for her S.C. letter. She testified he threw up her old supervisor, Jerry Stephens, to her and the subject of firing her was brought up such that she felt threatened and "I knew I had to look out for him."

Noble denied he ever said in this December 3, 1986 meeting he would fire Pogue. However he testified since he told her because of the lack of deliverable work products he would have found her work performance unsatisfactory, from that she could have concluded he was saying he would fire her. He testified he told her the same thing in their November 14, 1986 meeting. At CX 120, pg. 550, Noble reflected his December 4, 1986 memorialization of what he told Pogue as a result of the S.C. letter.

Following this acrimonious December 3, 1986 Pogue-Noble meeting, Pogue talked to Tatum and attempted to get transferred from Noble's supervision, somewhere else in Code 106. When Tatum said no, she discussed a temporary assignment out of Code 106. I find as a fact that when she talked with Tatum on December 3, 1986 about Noble's reaction to the S.C. letter and what transpired in the Pogue-Noble confrontation that day, Tatum did talk to her about and suggest transfer out of Code 106 to Code 460 because of what both Noble and Pogue related to him in their individual conversations with him that day. Tatum's testimony overall had

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many statements as to a lack of recollection as to what was said in various conversations, conversations which would appear rememberable. I find however from what he did attest as to his December 3, 1986 conversation with Pogue, Tatum did indicate, as pogue testified, a temporary transfer as a solution to the Pogue-Noble problem.

On cross-examination, the specific basis of Tatum's retaliation concern became evident. Tatum testified he was concerned after Pogue's December 3, 1986 advice to him as to what had transpired in the Pogue-Noble December 3, 1986 conversation and particularly the fact Noble told Pogue he knew of her cover-up letter, a fact Tatum felt was better left undisclosed to Pogue, that actions taken by Noble could perhaps give an indication of possible retaliation. Tatum testified he discussed with Noble that before Noble went and started actions, whatever they were going to be, he advised Noble to take precautionary measures to avoid getting any personal indication of retaliation involved on it, "he wasn't sure Mike was equipped at that time to deal with it."

Tatum testified since working under him Noble has had some problems with employees which he would classify as related to Noble's personality. Tatum was of the opinion Noble was not the smoothest operator in the world when it came to talking to and working with people, which created some friction. While this was usually in some way tied to an employee's performance, and generally Noble was correct about the underlying problem, "however the manner in which he handled it was abrasive, I suppose I'd say, to some of the involved employees, not all of them but some of them." Tatum attested the fact Noble had to approach and deal with an employee on the quality of performance, attendance, on some occasions turned out to intensify the problem. Noble himself testified to his past difficulties as a supervisor and manager in handling on-the-job personnel relationship problems, including difficulty with an Industrial Relations person. Industrial Relations is the Shipyard's personnel office.

Tatum's testimony as to what Noble stated to him in their conversations December 3, 1986, or shortly thereafter as 'there apparently were several conversations between them as to the Pogue situation and the S.C. letter, in conjunction with CX 120, pg. 555 establishes that as of December 3, 1986 and after he became aware of Pogue's S.C. letter, Noble then decided to find and appraise Pogue's job performance as unsatisfactory; that he then advised

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Tatum what he intended to do. Tatum testified Noble had previously discussed Pogue's performance with him.

While Noble testified he made the decision to issue the January 22, 1987 Unsatisfactory Work Performance Notice after his January 16, 1987 meeting with Pogue where he evaluated her performance to date on his written December 3, 1986 assignments, the record establishes Noble made this judgment and decision December 3, 1986, based on her HW performance and his perception and evaluation of what she had done on the noise assignments he memorialized October 28, 1986.

I also find that as a result of a subsequent Noble-Tatum discussion, Tatum decided not to support Pogue's efforts to remove herself from Noble's supervision and advised her that contrary to their conversation on or shortly after December 3, 1986 this could not be done. Tatum's stated basis was a temporary transfer, unlike a permanent transfer, would be chargeable to the Office/Division's staffing allotment.

Tatum's testimony indicated he had no problems in his personal dealings with Pogue prior to December 3, 1986, or since. There is nothing in his testimony to indicate he personally had any problems with either her job performance or conduct prior to December 3, 1986 and he rated the SR's she worked on as adequate. He similarly so rated the SRs on which Cornelis worked, rating Thompson's SRs excellent. Both Thompson and Cornelis, who holds a doctorate, have U.C. Davis HW certification.

While Tatum's testimony also indicated that prior to December 3, 1986 it was apparent there were problems with Pogue, the thrust of his testimony would indicate his knowledge of these problems came to him either through Noble's statements as to what her problems were or when Pogue brought to him a disagreement between herself and Noble as to what Pogue had written on a SR. Tatum's memory SR No. 16 was the first SR on which this occurred is apparently faulty since Pogue and Noble both agree their SR revision/rewrite problems started with SR No. 21, one basis for Pogue's charges in her S.C. letter.

Tatum also testified that after Pogue initially started in HW, in Noble's absence Tatum was her immediate supervisor on these reports and project. He testified this fact led to establishing what may have appeared to be a relationship for the future between

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him and Pogue, that Tatum was going to be dealing with Pogue directly and not through Noble. (SR Nos. 18-20 reflect they were signed for Noble.) "Some of what happened as a result of that turned out to be part of the problem that Mike Noble was gone and I had to deal with her directly. There were instructions that I had given her one week, when her supervisor got back he was giving her instructions. I think that may have created the condition, and a bad working condition in her Code 106 employment when I look back on it." After these initial direct one-on-one reportings to Tatum in Noble's absence, Tatum met weekly with Pogue and Tung. Only at times was Noble present.

From Tatum's testimony I can find the only specific Pogue job performance problems Noble related to him prior to December 3, 1986 were related to Pogue's writing of the SRs, and Shop 71's reaction to SR No. 16; Pogue's approaching Tatum because of differences between herself and Noble in the writing of these reports which, in hindsight, Tatum thought resulted from Pogue's receiving instructions from both Noble and himself, he thought a "bad working condition" in her Code 106 employment; and the dress rehearsal before the November 14, 1986 meeting. While Tatum stated the November 14, 1987 dress rehearsal was discussed by Noble in the Tatum-Noble December 3, 1986 conversations on the "cover-up" letter and Pogue's unsatisfactory job performance, Tatum did not testify further nor specifically as to what he knew, or was told, by Noble as to the circumstances surrounding the November 14, 1986 Noble-Pogue discussion in connection with the "dress rehearsal," where Pogue's concerns about the Shipyard's HW violations were voiced. This is the conversation between Noble and Pogue on which Noble bases his stated interpretation of, and reaction to the "cover up" letter, explains his "chain-of-command" meaning as he used it verbally and in documents to charge Pogue with a pattern of failure to follow his orders.

As reflected in the record, the November 13, 1986 dress rehearsal was a mock-up of a presentation to be made November 14, 1986 to the Shipyard Commander on solvent waste recovery. Noble testified solvent waste recovery and the Solvent Waste Recovery Program (USE) is part of the HW Project Engineer's charter; it impacts on HW and that while in her temporary HW duties Pogue had no USE responsibilities, she was suppose to attend USE meetings to see if the Shipyard was moving in the direction of HW generation.

Pogue testified Tatum had invited her to attend this top

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command presentation; she attended the mock-up for it November 13, 1986 and when Noble overheard November 14, 1987 that she was going to it, only because a secretary asked Pogue why she was dressed up that morning, Noble talked to Tatum and she was

then told she would not attend. Noble testified Tatum "excused" Pogue from this meeting.

It was after being advised she would not attend the presentation to the Commander that Pogue, on November 14, 1986, went to Noble charging him with her removal from the presentation, stating he was unconcerned about Shipyard HW and that she and a Code 460 employee had Shipyard HW violations concerns. According to Noble it was during this Friday November 14, 1986 meeting, and the Monday November 17, 1986 follow-up meeting he called to tell Pogue he would not countenance her further accusations, that he told Pogue, prior to December 3, 1986 and her S.C. letter, of her deficient job performance.

Noble's log memorializations of the November 14, 1986 and November 17, 1986 meetings with Pogue however do not reflect a statement by him at that time that her job performance was deficient. In view of what is reflected in his log memorializations, and the very fact memorializations were made, if Noble had in fact so advised Pogue November 14, 1986 - November 17, 1986, it would have been reflected. It is found Noble first advised Pogue her work performance was deficient December 3, 1986 during their meeting on her 'cover-up" letter.

Noble testified that in deciding to hire Pogue into Code 106, he thought her strong interest in hazardous waste would be transferred over to the up-front end of hazardous material industrial hygiene and if that motivated in the hazardous waste area, she could work out. Pogue clearly has a significant interest in solvent waste recovery, as reflected in the evidenced information as to her beneficial suggestions, her involvement in the USE meetings, the Shipyard newspaper publication on her project. Ralph Lee's testimony reflected the background and circumstances of this interest, the differences of opinion on this question at the Shipyard, including that manifested at the october 9, 1986 USE meeting. The portion of her December 3, 1986 S.C. letter where Pogue told the Commander her views on Shipyard solvent recovery was written, she testified, because once she decided to write the Commander she decided she would add this information.

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The basis for Tatum's generalized statement Noble advised him prior to December 3, 1986 of Pogue's unsatisfactory work performance is not, in his testimony, otherwise particularized. However since in rating Pogue's performance on the HW reports Noble testified that as against Thompson, a 9.5 on 10 scale, Pogue was a 6.5 to 7, the stated basis for Noble's December 3, 1986 determination of unsatisfactory performance was in large measure Pogue's performance on the noise assignments he wrote up as of October 28, 1986, in conjunction with Pogue's direct and assertive statements to him as to how she perceived his actions in handling the Code 106 HW inspection responsibilities with which she was involved, including the Balli reaction to SR No. 16.

The actions which form the bases of the retaliation complaint under these Acts, those which occurred on or after January 20, 1987, are based both on conduct and job performance. Below the articulated legitimate business reasons and facts underlying the January 22, 1987 Noble Unsatisfactory Performance Notice, subsequent March 31, 1987, April 10, 1987 Noble-Tatum similar Performance Ratings and withholding of within grade increase on which the April 10, 1987 involuntary transfer out of Code 106 was founded, will be examined as well as the conduct-related disciplinary actions claimed retaliatory.

However, the following chronology of events after December 3, 1986 is outlined in determining whether the articulated legitimate business reasons for these various personnel actions demonstrate whether each would have taken place in the absence of Pogue's cover-up letter, her protected activity. This is a letter which arose out of, flowed and resulted from Pogue's HW inspector activities, a job the purpose of which was to audit Shipyard hazardous waste handling, under the provisions of all these Acts, an audit which, depending on what the auditor found, could disclose facts on hazardous waste handling which would constitute violations under all the Acts at issue, auditing activities which were in response to pending civil litigation against the Shipyard and attendant newspaper publicity.

Within the six weeks Pogue worked after Noble's December 3, 1986 threat to rate her unsatisfactory, his implication to fire her, the following occurred. Pogue was on leave from December 20, 1986 until the week of January 5, 1987.

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-- 12/4/86 Pogue's pending job performance standards signed off on by Tatum.
-- 12/12/86 Pogue requests appointment with Noble to discuss noise material (IH) as he directed 12/3/86. No responsive scheduling by Noble until 1/5/87, a date which Noble apparently cancelled. Appears first Noble meeting in response to Pogue's 12/12/86 request was 1/16/87 where he rated her unsatisfactory.
-- 12/17/86 Approx. 8:30 a.m. Noble's oral withdrawal of Pogue's DPDO authorization. The occurrence which transpired that afternoon forms basis for 1/13/87 Official Reprimand.
Approx. 2:00 p.m. Pogue has Loyberg call Noble to tell Noble she is going to DPDO to pick up desk/lamps. She had previously ordered these DPDO items for use in Loyberg's office while on her noise assignment.
-- 12/20/86 Pogue on leave.
to
-- 1/4/87
-- 1/5/87 Meeting Pogue requested 12/12/86 with Noble to discuss noise material (IH) cancelled by Noble.
-- 1/7/87 Noble leaves note for Pogue criticizing her Wed. postponement of Loyberg meeting. "There is no reason for that!...(Y)ou are spending too much time just getting started. Nothing has been done as far as constructive shop evaluations. (Y)ou have been provided with more than enough information to get

started." Pogue postponed meeting for a difficult to secure medical examination. Noble did not ascertain reason for Pogue postponement before leaving note.
-- 1/9/87 Noble advised Pogue at meeting called with Fisher Fri. he was going to officially reprimand her for 12/17/86 DPDO p.m. incident.
-- 1/13/87 Noble serves Official Reprimand on Pogue, item No.

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Tues. 3 of which cites to her failure to be at the 1/9/87 meeting at 9:00 a.m. "(Y)our defense for which was car problems." Tatum described this official Reprimand as "loaded," rambling containing irrelevant material.
-- 1/16/87 Noble testified he decided after this first weekly Fri. job performance meeting he scheduled following 12/3/86 that Pogue's job performance was unsatisfactory and he would issue 30-Day Unsatisfactory Notice. Pogue testified she was given no prior advice of, nor time to prepare and gather her work for Noble's review, at this meeting. Testified Noble stood over her at her desk while she tried to locate her materials which "did not help."
-- 1/20/87 Pogue given Shop 31 noise-related assignment which included measuring noise levels, with a two-week completion due date.
-- 1/22/87 Noble issues Notice of Unsatisfactory Work Thurs. Performance and 30-Day Period to Correct Performance.
-- Refers to additional clarification, training material, references and assistance provided Pogue by audiologist. "Too much time playing with computer to simply generate a list of noise hazardous areas. No in-depth noise control training is needed."
-- Grossly insubordinate on two separate occasions to me.
-- You did not follow my specific directions on the chain of command in preparing your report on hazardous waste concerns in this Shipyard.
-- Repeatedly gone around me to my boss ... attempting to circumvent my directions.
-- Tried to seek my authorization on several occasions stating Tatum had directed you,

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including transfer to Code 460. In subsequent discussions with Tatum I have found you have invariably chosen to misinterpret or misunderstand his communication.
-- Unless significant progress within 30 days action will be initiated to remove you from your position ... progress will be monitored by Mc Louth and myself.
-- 1/22/87 Noble, Pogue, McLouth meeting on Pogue's Thurs. performance of her work assignments. Shop 31 Boris wanted 800-900 noise surveys done on his equipment. Noble said turn over to others.
-- 1/23/87 Pogue, Noble and Fisher meeting re 1/13/87 Noble Fri. Official Reprimand
Noble, following this meeting, refused to delete item No. 4 which recited:
-- "verbal warnings past months about insubordination, ...concerns about your performance"

or delete
-- refusal to follow Noble's written direct order to view "The Self-Fulfilling Prophecy - The Pygmalion Effect."
-- In fact, Shipyard personnel have documented that Pogue, in late 10/86, early 11/86 did follow Noble's direction she view this film, and only because of Shipyard unavailability did she not view it until 1/16/87. Pogue also in 11/86, made contact for the "Interact" training of Noble's request. CX 627.
-- Noble did remove implication of his 1/13/87 Official Reprimand that Pogue lied as to car problems. Pogue submitted a 7:40 a.m. car repair bill and Noble's timekeeper advised she failed to transmit Pogue's call-in re car trouble lateness.

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1/26/87 -- Noble memo to Pogue, in response to her 1/23/87 Mon. written request for assignment instructions re Shop 31 which begins "To be quite frank I'm growing a little tired of your games." Memo refers to her "attitude and gaming associated with assignments ... " Noble had on 1/22/87, changed Pogue's Shop 31 assignment responsibilities.
1/26/87 -- Rescheduled job performance meeting of Pogue, Mon. Noble, McLouth. Pogue 15 minutes late. Offered explanations are contested by Noble. Noble proceeds with job evaluation and found he could not get through to Pogue who, he testified, constantly interrupted him.
1/27/87 -- Meeting scheduled with Pogue-union and Noble. Tue. 1/27/87 -- Noble memo to Pogue re her work priorities Tue. question which begins "You are continuing to play games" and ends "Your wasting my time and yours."
1/28/87 -- Noble calls meeting of Pogue-Fisher to advise he Wed. is going to suspend Pogue for three days for failure to follow his direction as to the time of the rescheduled 1/26/87 meeting.
1/29/87 Noble hands Pogue Decision to Suspend for three Thurs. days based on 15-minute lateness, citing 1/13/87 Letter of Reprimand as prior warning to follow his directions.
Noble learns after delivery he lacks authority to issue such a decision.
1/30/87 -- Noble hands Pogue Proposal to Suspend for three Fri. days based on 1/26/87 15-minute lateness.
Noble advises suspension will not begin until after 30 days given 1/22/87 to improve work "to insure that this action does not interfere with your work during the 30-day period."
1/30/87 -- Haberman memo to Noble that Pogue so overwhelmed did not have time for self-study.

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In the ensuing weeks the following occurred:

2/10/87 -- Tatum-Pogue-Fisher meeting on Noble's 1/13/87 Tues. official Reprimand.

2/10/87 -- Noble advised Personnel, in connection with Tues. computer notification re within-grade, that Pogue's current performance remains unsatisfactory. She was then in 30-day period to improve.
2/12/87 -- Noble requests the Navy's investigative office Thurs. to investigate what he stated appeared to be a "bogus" 2.8 hours sick leave request.
-- Leave slips were submitted by Pogue for medical appointments the afternoons of 2/2/87, 2/4/87.
-- Noble had advised Pogue 1/23/87 that while he would not disapprove leave during the 30-clay performance improvement period, she was not to request or take any leave. Thus she indicated in "Remarks" these appointments resulted from discussions during the Shipyard's RAD CON physical exam. Noble had the Shipyard Clinic read him Pogue's medical files which indicated she wished her breast examination to be done by her private medical facility. [In memorializing his note as to Pogue's Clinic records, Noble interpolated his knowledge of the female sex of the Clinic's physician assistant.]
-- Pogue's private medical facility refused Noble's/Shipyard's request for her medical records.
-- Noble testified at hearing that if any Shipyard employee wants to have her Shipyard required breast examination completed in connection with a visit to her private physician, she must not use her sick leave for this examination. He testified such an examination must be on the employee's own time, sick leave so used is not her own time.

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While Noble testified his February 12, 1987 investigative actions were taken because he believed Pogue would abuse her sick leave, information given him by her prior supervisors Kelley - Stephens, Pogue's sick leave records reflect that since coming to Code 106 Pogue had more accumulated leave than when she entered, and as of February 12, 1987 she appears to have had a better sick leave utilization record in Code 106 than at any prior time.

2/13/87 -- Noble called meeting of Pogue-Fisher to discuss possibility of disciplinary action for Pogue's 1/7/87 disrespectful conduct, use of insulting and obscene language to co-worker Hanson as well as for going through files on timekeeper's desk.
-- Hanson was Code 106.3 member of interim "team" Tatum set up in response to Commander's 9/3/86 directive. Tatum testified that presence and appearance in Shipyard of this Code 106 "team" was most important factor in response to Commander's directive. Noble had reason to believe Hanson (Code 106.3) was Division employee who told Balli, superintendent of Shop 71 Pogue was unprofessional and had mishandled SR No. 16, her first audit 9/10/86, which in conjunction with SR No. 16 itself triggered Balli's reaction, the meeting October 3, 1986 Pogue viewed as a critique, and her perception and statement to Noble that he was "playing politics" in handling Shop 71/Balli reaction, to SR No. 16.

Noble's testimony establishes Balli at 10/3/86 meeting initially attacked Pogue personally and professionally.
-- Until Tung's participation in the Code 106 audit no other member of the intended Code 106 team appears on Pogue's inspection SRs.
-- Noble testified the third Code 106 Division member who was to provide Pogue support was never really utilized but he did not know, and never ascertained or followed up 9/10/86 - 10/28/86, or at the time of the 10/3/86 Balli meeting whether that was Pogue's choice or if something had gone on within Code 106.

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-- Hanson's written memorialization of obscenity/file incident of 1/7/87 is dated 1/15/87, over a week after event.
-- Fisher pointed out to Noble 2/13/87 he should have contacted the timekeeper involved prior to calling this meeting. Timekeeper subsequently advised permission had been given Pogue while at her desk to go through leave slips, although carte blanche review not intended.
-- Noble's memorialization of this 2/13/87 meeting the outcome of which was a warning, states "there have been other instances of disrespectful conduct directed at me. After the last instance I warned Pogue on 12/3/86 that more severe action would be taken if this behavior were repeated."
2/20/87 -- *Second Stage Grievance Decision* - Tatum "All charges in letter of reprimand are fully supported and the letter of reprimand contains some irrelevant information."
-- disobeyed Noble's direct order.
-- away from duty station without authorization.
-- directed Noble to revise 1/13/87 Reprimand.
2/20/87 -- Issuance of Noble's official Reprimand. After Tatum review of Noble Official Reprimand, Noble then issued corrected copy which deleted "loaded" material. Corrected Noble official Reprimand is stated to be based on "other instances where you have chosen to disregard or misinterpret my orders."
2/20/87 -- Service on Navy of Pogue's Complaint in this action.
3/3/87 -- Noble, Pogue, Fisher meeting on Proposal to Suspend.

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-- Despite Fisher's harshness argument, Noble did not change decision to suspend Pogue for three days. Held Pogue failed to follow his directions as to 1/26/87 meeting's revised time despite his Letter of Reprimand's warning and stated a belief Pogue's lateness was a conscious decision on Pogue's part to demonstrate displeasure over Noble's not permitting Fisher to attend 1/26/87 performance improvement meeting.
3/4/87 -- First contact with Shipyard by DOL investigator.
3/10/87
to
3/11/87 -- DOL investigator at Shipyard.
3/27/87 -- DOL decision issued.

Pogue should be allowed to transfer to another Mare Island engineering position holding same promotional potential as present job.
3/31/87 -- Noble signed.
4/9/87 -- Tatum signed.
*Performance Evaluation Report which includes following statements*:
*Dependability*:
-- You were almost placed under a letter of requirement and counseled by Employee Assistance Office for leave abuse in Code 380.2. If it wasn't for the other performance and disciplinary problems/actions, I would have placed you under the same constraints. Even during your 30-day period to improve you wasted 60 hours of sick and unscheduled leave. You are not capable of supervising yourself and work very hard at resisting management direction.

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*Cooperation & Ideas*:
-- You have repeatedly tried to circumvent my directions, manipulate situations to have you reassigned to HW, a position I made very clear to you you were not hired for! You have had a very difficult and at times "stormy" relationship with the staff in this office as well as the shops you have worked in. You have been advised since october about your poor communication skills and the problems you were creating for yourself ... Your attitude toward your supervisor and coworkers has been very disrespectful.
4/10/87 -- Noble Notice of Unsatisfactory Performance, Decision to Transfer, Within-Grade Withheld.
-- Performance since 1/22/87 continues unsatisfactory.
-- Because of unsatisfactory performance must be reassigned, demoted or removed.
-- Continued unsatisfactory performance will result in action to remove. Instead of removal you are being given one more chance to improve by transferring you to Code 250.8.

Pogue who was obviously pregnant at June 18th trial was on leave of various kinds for significant portions of the work weeks ending February 21, 1987, February 28, 1987, and March 7, 1987, as well as for days during the following weeks. Then with her father's death she lost additional work time, and it was on her return to Code 106 around April 10, 1987 she was notified of the involuntary transfer based on the March 31, 1987, April 7, 1987 Unsatisfactory Performance Ratings.

Noble testified Pogue was reassigned by his October 28, 1986 work sheet from HW oversight to a noise control engineering feasibility study. On that day he also assigned her to work in Balli's Shop 71, in the Hearing Loss Control Program, notwithstanding her expressed concern regarding Balli's attitude to

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her over SR 16. Noble testified he had engineers in place in the other six shops participating in this project. He also assigned her a self-study course in noise control, with no due date nor specific product to be submitted. It is Pogue's stated job performance deficiencies in these assigned duties which are the stated legitimate business bases for the January 22, 1987 Unsatisfactory Notice, the bases for Noble's indication to Tatum, when they discussed the December 3, 1986 cover-up letter, that Pogue's job performance was unsatisfactory.

Noble testified that as of December 3, 1986 he began documentation of Pogue's work performance on the October 28, 1986 noise control - Industrial Hygiene Self-Study projects, not because of her cover-up letter but because he viewed her performance to that date on these assignments as deficient.

Noble testified that on December 3, 1986, for the first time, he reviewed the two noise work materials Pogue had submitted to him, submitted he thought in mid to late November 1986, perhaps the third week in November 1986. He testified Pogue submitted these materials with a note in which she asked him for further directions. Pogue has no experience, education nor training in noise, or noise control, and it was an entirely new area for this engineer. Noble testified it was the "cover-up" letter which precipitated his review of Pogue's work; his pre-December 3, 1986 workload resulted in his not being as concerned about her work as he should have been until December 3, 1986.

Sometime before December 3, 1986, in connection with her work on the noise control assignment, Pogue and Noble discussed the Naval Hospital study report, the three volumes from which she was to extract and prioritize approximately 350 noise sources for noise control engineering studies. Noble then agreed she could computerize the study's material.

When, on December 3, 1986, Noble did review Pogue's November 1986 submissions he told her his secretary could have generated the same list in 8-10 hours. She explained the time required to computerize the entire material, as they had discussed and he had agreed. He testified when he so agreed he did not appreciate it would increase her workload as it did. However if he had then appreciated that what she was doing would ultimately benefit Code 106, he would have extended the November 7, 1986 due date on the

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October 28, 1986 assignment sheet for this project.[9] Testimony indicated that computer work Pogue did in connection-with her initial pre December 3, 1986 work on the Naval Study noise assignment has been used and sought by other Code 106 personnel in the Code's work activities.

The Navy's position is Pogue likes to "play with the computer" and do HW work but avoided her noise assignments because she believed and stated they were trivial;[10] and

that with her background and training, she needed no training other than what was given her to perform the noise assessment tasks assigned.

On December 3, 1986 after advising Pogue and Tatum of her job performance deficiencies, Noble rewrote Pogue's noise assignments. On her noise control project sheet quantitative results were inserted. She was to evaluate 25 sites a week if in the same building, 15 a week if in different buildings with implementation ASAP. She was to see him each Friday with a status report. It was however not indicated these reports were to be in writing, but Noble's testimony indicated he expected "engineering fix" propositions and proposals from Pogue. Due dates were inserted on the five-volume self-study assignment, in an outlined publication, with quizzes to be submitted. Noble granted that understanding some of the noise sections in the self-study resources he directed Pogue to could be complicated and he believed his quantitative requirement of a chapter a week took this factor into account.

Noble in explaining his December 3, 1986 Pogue work assignment revisions noted they were somewhat dictatorial in approach and were not his usual supervisory approach where he believed an employee was applying themselves to assigned tasks and trying. He had found however through prior experience with another deficient employee that unless he did as he did December 3, 1986 with Pogue, he would not get results. On December 3, 1986 he directed another Code 106 employee, wayne Loyberg, to provide initial training and direction to Pogue on her noise control engineering feasibility project.

Noble had stated December 3, 1986 weekly noise control meetings would be held. Pogue's indication that on December 12, 1986 she requested a work performance meeting with Noble and her supervisor did not meet with her appears supported by the

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documentation she submitted at CX 126. It would appear no meeting occurred between them related to work performance after December 3, 1986 until January 16, 1987. After this meeting Noble decided to find her job performance unsatisfactory.

Wayne Loyberg, for the six years of his Shipyard employment, until recently all under Noble's supervision, has been an audiologist in Code 106. He has a 17-year background in the field of industrial-military noise conservation. Noble and Loyberg have worked together on noise study publications. Loyberg at Noble's request, prior to 2/1/87 provided Pogue with 6-1/2 hours of on-the-job noise training.

Loyberg's testimony indicated that Pogue's assignment was to come up with common sense, not highly technical, elegant engineering solutions to the noise problems of the 350 sites in the Naval Hospital report. He was to orientate her to noise measurement equipment, provide some orientation to noise hazard prioritization and common sense noise control solutions. Loyberg testified his training on his sound measuring equipment which he gives to GS-5/7 sound monitoring technicians, rather than the Code 730

certification training Pogue sought of Noble, would suffice for the accuracy of the measurements she had to do on the project assigned. Loyberg testified he believed Pogue should have been able to complete the assignment.

Based on his experience and with his training, he also testified she was a trainee in this assignment, made mistakes in her first excursions into the shop areas, and he gave her books on noise control to read. (Dr. Haberman wrote these confused Pogue.) Loyberg further testified that in field shop visits to the study's listed noise sites some equipment could not be located and Pogue was advised, after Loyberg talked to Noble, that Pogue could telephone manufacturers for information that could or would provide the sound "fix." Loyberg did not testify how long he believed it would take Pogue to complete the noise control assignment she was given but did indicate that it was a fairly large job which would certainly take awhile and he would anticipate a long time in accomplishing it. He testified Pogue appeared worried Noble would not be pleased with her work product and told him she was not exactly sure how to please Noble on the noise assignments. Loyberg had reason to believe from calls Pogue made to him for advice and assistance that she was working on her noise assignment. On more than one occasion in the December 3, 1986 - early January 1987

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period Noble asked Loyberg for reviews on Pogue's work performance, something never before requested of Loyberg in his audiologist Code 106 work with other Shipyard employees.

Pogue asked Loyberg in December 1986 if it would be all right with him to move over to his office for part of her time. She was then working on the noise control project and she indicated she wanted to be near him to ask questions as they occurred and she also indicated she wanted to get away from her difficulty with Noble over the cover-up letter. Pogue, who had Code 106 authorization to secure DPDO material (DPDO being where excess material was stored), prior to December 17, 1986 had ordered a desk and lamps for Loyberg's office.

Loyberg's testimony indicated that on December 17, 1987 he and pogue had been in the field on Pogue's noise project when, on their afternoon return, Pogue asked him to make the telephone call to Noble which is the basis for the February 20, 1987 upheld January 9, 1987 Letter of Reprimand. Pogue asked Loyberg to call Noble to let him know she was going to DPDO to pick up a desk and lamps for Loyberg's office, and proceeded to DPDO before Loyberg's call to Noble.

This Reprimand is based on Pogue's failure to obey Noble's order, attested to be a direct and clear order she was not to go to DPDO. This order is attested to have been given early in the morning of December 17, 1986, when Noble advised Pogue her DPDO authorization to secure DPDO material was withdrawn, that she was not to go to DPDO.

On review of the record the undersigned now agrees with Navy counsel that as to the December 17, 1986 DPDO incident, Noble's a.m. withdrawal of Pogue's DPDO authorization and his attested directions to her at the time he orally advised her of his withdrawal of her DPDO authorization that she was not to go to DPDO, to the extent Mike Noel was a percipient witness to what occurred and to exactly what was said at that time by Noble and Pogue, Noel's excluded testimony could be corroborative of Noble's testimony he gave Pogue a direct order not to go to DPDO, clear from what he then stated to her.

Pogue contends what Noble said to her in this encounter did not indicate and was not understood by her to preclude picking up previously ordered equipment. She contends Noble's statements only prohibited her from going to DPDO for "more junk," precluded only

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her ordering new equipment or screening for new equipment, and did not apply to equipment she previously ordered in November, 1986 which she went to pick up the afternoon of December 17, 1986.

The decision is therefore reached here on the basis that such excluded testimony by Noel as set forth in the Navy's offer of proof would be corroborative of Noble's testimony as to what he told pogue December 17, 1986 so as to support a basis for disciplinary action for failure to follow a supervisor's order, notwithstanding no prior warning was given. Such prior warning is not required under the Shipyard's personnel practices set out in N-53, pp. 200-234. The decision is thus reached here on the assumption that Noble and the Navy had a legitimate business reason for disciplinary action against Pogue based on Noble's December 17, 1986 morning order and Pogue's DPDO afternoon visit after asking Loyberg to call Noble.

The December 17, 1986 incident occurred two days before Pogue's Christmas leave began. The week of her January 5, 1987 return Noble advised her of his intention to issue a Letter of Reprimand on the DPDO incident, did so the next week and also that next week, on January 16, 1987, decided to find her job performance to date unsatisfactory, the notice issuing January 22, 1987. A week after his January 22, 1987 notice, Noble handed Pogue a three-day suspension notice because she was 15 minutes late to the january 26, 1987 work performance review meeting he had scheduled. Noble did not accept her explanation, viewed her lateness as a deliberate violation of his time order.

The record reflects Noble's testimony, describing in detail how on each weekly status of job performance meeting he held with pogue after January 16, 1987 and until early March 1987, she failed to meet his job performance expectations, the basis for his unsatisfactory job performance rating, the denial of a within-grade increase and her involuntary transfer out of Code 106 in April 1987.

It is found and concluded that Pogue in her December 3, 1986 cover-up letter to the Shipyard Commander, a letter which resulted from her activities and reports as the Shipyard's investigator of HW violations, violations which under the job description for this function could involve HW violations under the RCRA, the TSCA, the WPCA, the CERCLA and which, as reflected in the seven SRs on which Pogue worked, did involve stated HW violations which would

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fall within the parameters of the RCRA, the TSCA, the WPCA, the CERCLA, Pogue was in these activities engaged in protected activities within the provisions of the RCRA, the TSCA, the WPCA, and the CERCLA.

Further Pogue's January 1987, February 1987 contacts with the State Department of Health to disclose the HW violations she had investigated and she had reported to the Commander, at a time when the State was pursuing civil action against this employer for RCRA violations, were protected activities under and as defined in all four Acts here, protected activities known to this employer by no later than her February 20, 1987 Complaint, subsequent to which date some of the claimed retaliatory personnel actions occurred including the unsatisfactory March 30, 1987 rating, within-grade withholding and involuntary reassignment.

I am of the opinion that under the case law applicable to the issues under these Acts: *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274; *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089; TRW, Inc. v. NLRB, 654 F.2d 307 and *Consolidated Edison Company of New York, Inc. v. Donovan*, Dkt. No. 81-4215, 2nd Circuit Court of Appeals, 3/8/82; this record must be analyzed and further findings made in accord with the following principles. Assuming jurisdiction, the complainant must make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision to take the personnel actions this record reflects were taken against her as of January 20, 1987 and later. Having so established, which as indicated below I find from this record, the employer must articulate a legitimate business reason for the actions taken against complainant, demonstrate that the same action would have taken place even in the absence of the protected conduct; and the complainant must then persuade by substantial evidence that the protected activity was the moving cause for the dismissal or other complained of discriminatory action under the Acts at issue.

The following further findings of fact and conclusions of law result from evaluation of all the evidence under these legal standards.

Preliminary to determining the ultimate issue of whether retaliation for Pogue's protected activities was the basis for personnel actions taken against her for which she is entitled,

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assuming jurisdiction is found, to relief under the employee protection provisions of these Acts, perceptions as to the testimony of Noble and Pogue in certain vital areas, with findings based on these perceptions must be set forth. These perceptions and findings as explained below are not based on a determination as to these two central witnesses' relative credibility on determinative factual questions.

I believe that when Pogue wrote the Shipyard Commander of her belief of a cover-up of HW violations, that this cover-up was due to controversy, reactions and pressures from Shipyard shop managers to the reinstituted SRs with which she was involved, and when in this letter she spoke of her concern that HW violations were not being addressed based on her perceptions of how HW oversight and the issuance of SR's was handled in Code 106, Pogue acted on a genuinely held belief significant Shipyard HW violations had or were occurring, of which the Commander should be advised, as the the Commander himself invited. When while the State was suing the Shipyard over similar violations, Pogue went to the State with her concerns as to Shipyard's HW violations, I believe she similarly acted on a reasonably held belief of violations unaddressed by the Shipyard. This finding is dependent not on Pogue's credibility in attesting to these beliefs and her reasons for them, including the rewriting, restructuring differences and difficulties Pogue and her supervisor Noble had in the generation of SR No. 21 and No. 22. The testimony of Lee, Noble and Tatum indicate the unusualness of the Balli circumstances and reaction over SR No. 16, Pogue's very first SR. Lee's testimony establishes that among other Shipyard managers/supervisors there was controversy over these reports, with five inspection reports generated in a little over a month, after an extended hiatus and as compared to the prior SR issuance rate.

Whether this employee was correct in her perceptions, beliefs, and on-the-job actions relative to her HW reportings is not determinative of the issues here. Similarly, whether what her HW investigations revealed, what the SRs reported, or what she advised the Commander constituted compliance violations under any of these Acts, is not determinative.[11] Rather, since I find Pogue in her reportings to the Shipyard through her SRS, in her cover-up letter to the Commander, and in her contacts with the State entities involved in the pending litigation, reported reasonably perceived Shipyard HW violations which fell within the ambit of the four environment protection statutes here and engaged in protected

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activities within these Acts' meaning, activities known to the Shipyard as of her December 3, 1986 cover-up letter and February 20, 1987 Complaint, the determinative issue is whether the personnel actions January 20, 1987 and later were retaliation for her whistleblowing.

Set forth are perceptions as to two aspects of Noble's testimony which bear on the question of his, and the Navy's motivation in taking the personnel action they did, perceptions interpolated into the weighing of Noble's testimony and the documentation on the question of legitimate business reasons for the personnel actions taken. These perceptions are based not on the relative credibility of Noble vis-a-vis Pogue, but on what is found to be the inherent incredibility of what Noble represents in these two areas.

When Noble in the various personnel documents evidenced and the notes he wrote, as of and since December 3, 1986, referred to Pogue's failure to comply with his "chain-of-command" order, the record clearly establishes his "chain-of-command" reference was to the fact she wrote her cover-up letter to the Shipyard Commander. This is what Noble intended and meant by this "chain-of-command" reference, i.e., Pogue's December 3, 1986 Shipyard Commander letter. Noble did not represent otherwise in his presentation.

However, Noble did represent that what he meant in so referring to and characterizing this cover up letter was as follows. In his discussion with Pogue where she accused him of a lack of concern with Shipyard HW violations, the date of which as nearly as can be fixed from the witness' memories and Noble's log memorializations was November 14, 1986, he then told her to address her concerns through Code 106 and by writing the Commander directly she did not follow his orders and violated the "chain-of-command."

Although Noble did not see the December 3, 1986 letter until later, Noble was advised by Tatum December 2, 3, 1986 that Pogue's letter to the Commander charged a cover-up of Shipyard HW violations. Based on Tatum and Noble's testimony as to their December 2 - December 4, 1986 discussions of Pogue's letter, and the inferences to be drawn from what each said was then said, the circumstances of their discussions, it is found Noble then well knew the letter accused him of a "cover-up." Since Pogue had, according to Noble, in their one-on-one conversations just before and after he called the Balli meeting, told him he was "playing

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politics" with the SRS, told him he was not concerned about Shipyard HW problems, clearly Noble knew December 3, 1986 his and Code 106's handling of the SRs HW violations Pogue had been involved with were the subject of her cover-up letter to the Commander.

To attest he did not view her "cover-up" letter separate from any direction he may have given her to address her concerns through Tung; to represent he would believe she should direct a "cover-up" letter, which he knew the Shipyard Commander letter was, through the parties and office she believed were covering up Shipyard HW violations is incredible. Noble's representations as to why he so viewed the "cover-up" letter as a violation of his chain-of-command order do not make sense in the circumstances. They are inherently implausible and pretextual within this term's meaning as applied in fact evaluations under these Acts. Noble's notes as to these discussions held with Pogue do

not reflect an indication he so told her to direct a memorandum of her concerns, signed also by the Code 460 individual to whom she alluded, or that he discussed any written memorialization of her HW concerns.

Noble extensively explained the background and reasons for his perceptions of Pogue's work activities, actions and her statements to him while in Code 106. He attested these motivated the actions he took both in the personnel decisions which are the subject of this action and in their earlier differences and difficulties on Pogue's HW inspector assignment. Noble represented his motivation and decisions/actions on the Code 106 occurrences were in significant measure based upon information he had secured before he hired Pogue into Code 106, from Pogue's prior Shipyard supervisors, particularly Kelley-Stephens of Code 380. The testimony was presented assumedly to reflect the legitimate business reasons motivating both Noble and the actions he took based on Code 106 occurrences post September 10, 1986 and Pogue's HW inspector assignment. According to the Kelley-Stephens information Pogue was a virtual incompetent, her work output was a problem, the quality of her work was a problem, and she had a lot of conflict with them and staff members. Noble attested Pogue's earlier Code 2300 supervisor Christianson was of the same opinion. Noble testified this information influenced and reinforced how he perceived the difficulties he had with Pogue in Code 106, and how he determined he would deal with them.

The facts however as to Pogue's prior work experiences in Code

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2300 and Code 380 are as follows. Pogue's performance in Code 2300 was rated satisfactory by her Code 2300 supervisors in March 1985. Stephens, whose Code 380 overall marginal rating was countersigned by Kelley, was forced to revise a category of this rating because both these supervisors signed to an untruth. They reflected a complaint as to Pogue's performance from a Shop which she proved was untrue. Such a complaint had never been made. Pogue testified as to Stephens' unhappiness when his factual incorrectness was established.

It makes no sense supervisors under the highly structured performance rating system this record reflects obtains at this facility would complete written ratings stating satisfactory, or marginally satisfactory performance if the untruthful Kelley-Stephens raters are to be believed, an essentially meaningless paper exercise if the oral ratings of Noble's testimony were in fact the case.

Noble's testimony would indicate either Code 2300 Shipyard supervisors under this facility's performance appraisal system failed in their supervisory responsibility to take the necessary action this record reflects is required of supervisors where an employee's performance is unsatisfactory, or they misrepresented on an official performance rating. While the Code 380 appraisal change forced by Pogue's Shop statement may give pause as to the credibility of the appraisal system represented, to accept Noble's testimony as to

a separate, contrary oral evaluation erodes the truthfulness of a performance evaluation system, assumedly designed by management for the purpose of factual, credible evaluation to assist management's mission, enhance, increase, improve employee performance.

Noble attested that despite what these supervisors advised as to Pogue, how incompetent and troublesome she was, he not only hired her into Code 106, when the Shipyard Commander's September 3, 1986 direction was received he selected her for the Commander's and Tatum's high-priority, high-visibility job when it was known the Shipyard was being sued by the State over HW violations and, as the record reflects, the Shops could be sensitive to being the subject of HW violation citations. Tatum testified he advised the Ship Commander not only of Pogue's selection in response to his September 3, 1986 directions, he filled the Commander in on Pogue's background.

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Noble is an intelligent man, a GS-14 with a Masters in Environmental Health, an MBA in Health Management and a long-time supervisor of Shipyard professionals. It makes no sense that any supervisor, no matter how hard-pressed for immediate personnel, would hire on such an incompetent, troublesome employee as he testified Kelley advised unless he disbelieved what he was told. I find Noble's action in hiring Pogue reflects he discounted what he heard from Kelley-Stephens. This and his assignment of Pogue to the HW inspector job reflects, in my opinion, how little credence he gave to what he heard from them.

It is not believed the oral evaluations and past history Noble attested he secured from Pogue's prior supervisors were the motivating factors in the Pogue personnel actions Noble took January 20, 1987 and later, or since the December 3, 1986 cover up letter. Nor do I believe they played any significant part in what motivated his supervisory actions. It is my opinion Noble's actions were motivated not by past history but by what occurred between Pogue and Noble in their one-on-one employee-supervisor relationship in Code 106, their interactions, one-on-one conversations and discussions beginning with that just prior to the Balli SR 16 meeting and that Noble's rationale and motivation arose from his own reaction and judgment based on these developments as they occurred between them, one example of which is his institution of the sick leave investigation. To the extent Noble attributes his motivation for any of his actions/decisions, to information he obtained from prior supervisors, as the term is used for purposes of evaluation under these Acts, such representation is found pretextual, represented by Noble for litigation purposes.

The personnel actions at issue here, the actions Pogue's reprisal Complaint is based on, in their temporal relationship to Noble's knowledge of her cover-up letter to the Commander and his December 3, 1986 statements to her that day, the post-February 20, 1987 reprisal actions following so quickly after service on the Shipyard of the February 20, 1987 Complaint, would by inference establish Pogue's prima facie showing the cover-

up letter and Complaint motivated all Noble's subsequent actions. However Noble's documentation and statements which indicate Pogue's cover-up letter played an integral, significant part in the personnel and other actions he took against Pogue after December 3, 1986 and January 20, 1987 uncontrovertably establish this is the fact.

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Fisher testified, and I believe, that while in their discussions on the Reprimand Noble indicated the Reprimand was based on Pogue's disobeyal of his December 17, 1986 morning order in going to DPDO that afternoon, characterized by Noble to Fisher as a act of defiance, doing it behind his back, Noble then advised Fisher of what he believed to be Pogue's prior insubordinate acts. These included Pogue's statements to Noble he played politics in handling the shops' reaction to SR No. 16, her letter to the Commander that Noble covered up HW violations. In Noble's actions vis-a-vis Pogue after December 3, 1986, I find Pogue's whistleblowing cover-up Commander letter to be the strongest motivating factor in how he acted and reacted to circumstances which might be legitimate business reasons for actions he took.

As Fisher explained, the Navy has a philosophy of progressive discipline. While the Navy's personnel specialist Stephen Zodrow's testimony was excluded from presentation, all of his representations reflected in the Zodrow Offer of Proof including his statements as to the operation of the Shipyard's personnel rules, regulations, and practices, his representations as to his, and the Industrial Relations Office's involvement in the Noble-Pogue personnel actions here, as well as Zodrow's opinions are admitted into this record, and will be considered as evidence of record in deciding the issues here. However, while Zodrow's factual statements and opinions, including those contrary to Fisher's, are admitted and considered including that to the effect the disciplinary measures Noble selected were appropriate to Pogue's actions which warranted these various post-January 20, 1987 personnel measures, this is a factual question for the undersigned to decide on the evidence within the parameters of case law applicable to discrimination complaints under these Acts.

Fisher testified his union, a union of approximately 600 Shipyard professionals, in the eight years prior to the Pogue disciplinary actions have had only two proposed disciplinary actions. Tatum testified to the limited number of disciplinary actions he has been involved with over his 30 years with Shipyard professionals. Fisher testified that in addition to the disciplinary actions Noble initiated against Pogue, with the number of Noble warnings of unsatisfactory performance, what occurred here between January 9, 1987 and continued until Pogue was transferred out of Code 106 was not only outside the normal, it was unprecedented. "I've never seen anything like it ... for a while it looked like they were coming on a weekly basis, it seemed like

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there was some reason for urgency to hurry things along...I felt like things were being rushed in terms of our grievance procedures for instance." Fisher found it hard to separate any of these personnel actions in his mind, "it's just part of one organic whole I guess."

In all his experience Fisher never saw a three-day suspension for being 15 minutes late to a meeting and he further pointed out that of all the prior Shipyard disciplinary actions against employees reflected at CX 23 the whole package, with but one exception, were disciplinary actions brought against blue-collar workers. The exception is Ms. Pogue. Fisher also pointed out that in those disciplinary actions evidenced, the supervisor made clear to the employee he was being given a "direct order." From what Fisher knew of the December 17, 1986 events he did not believe this was the case in the Pogue January 9, 1987 reprimand.

The Navy at NX 64 has evidenced all disciplinary actions taken against Shipyard employees since about 1982 for disobedience to authority, insubordination and refusal to carry out orders. There is an absence of professional employees from these summaries, as Fisher attested. Further it appears none of these employees was twice disciplined in less than three weeks' time. Recognizing this evidence reflects disparate treatment, the Navy urges this fact reflects not disparate treatment but how untypical of professional behavior at the Shipyard Pogue's actions were. This representation, in light of all the evidence presented here is in my opinion incredible.

Without even considering the fact that review of CX 23, NX 64, reflects how generally disparate the facts as to the blue collar workers, actions for which they were disciplined were from those which are represented to be the legitimate business reasons for the pogue Reprimand and Suspension here, review of the Navy's instructions to their supervisors as to discipline actions, NX 59, reflects that Noble in electing to take the level of disciplinary action he did as a result of the December 17, 1986 legitimate business reason he articulated, "use(d) an elephant gun in hunting rabbits," which most people would not do. Navy personnel experts so advise their supervisors in these guides.

Noble did not follow the Navy's written philosophy of discipline at NX 59, its guidance and personnel policy instructions to take such action usually after the employee has been advised

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continuation of unacceptable behavior will result in corrective action. While the Navy's policy may be that advance warning need not be given, the facts do not reflect Noble prior to December 17, 1986 and his election of a grievable Reprimand rather than non-grievable Oral Admonishment or Letter of Caution/Requirement, had any discussion with Pogue as to her unacceptable behavior in Code 106 other than his perceptions/reactions to her SR reporting.

When Noble's testimony was heard as to how he failed, as a many-year Shipyard supervisor to ascertain before he issued the January 29, 1987 Decision to Suspend whether in fact he had the authority to issue a personnel action of such significance; and was then heard to testify as to the arbitrary basis, for a 15 minutes' lateness, on which he selected a three-day suspension out of the one-to-five day option he then believed he had, he impressed, as he did throughout the days he appeared at hearing including at oral argument, so intensely involved emotionally, months after Pogue's removal from his work site, his overall judgment on the events which occurred after he learned of Pogue's cover-up accusation was totally colored by his personal reactions to Pogue and her cover-up letter. This was particularly so when he testified to his various notices to Pogue as to the time change of the january 26, 1987 rescheduled meeting. From his manner and presentation, Noble impressed when testifying to his instructions to pogue as to this meeting's time changes, as having convinced himself he was clear in his instructions, and Pogue's lateness was deliberate defiance of him. There was something in his eyes and manner of representation of this fact on the stand which indicated what he now represented may be colored by what he wanted to and must believe in support of the actions he took. Later review of the documentary evidence, with the number of various meetings scheduled, cancelled, and rescheduled during the January 13, 1987 - january 26, 1987 period, does not persuade there was no basis for confusion.

Tatum testified he told, advised and counselled Noble December 3, 1986 that in taking action against Pogue Noble must ensure he, took actions in accord with proper procedures. The record establishes Noble failed to follow the directions of his long-time supervisor Tatum when he issued the Suspension Notice without authority, disregarded as well Shipyard personnel policy to have all personnel actions reviewed, pre-issuance, by their Industrial Relations Office. This failure followed his failure just weeks before to consult Shipyard personnel experts so a

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"loaded" Reprimand Letter would not be issued, and he was unwilling to revise this Reprimand Letter until directed by Tatum February 20, 1986.

Such actions in an intelligent man are explained only by Tatum's analysis, based on his personal experience with Noble, and the impression Noble's testimony/documentation conveys overall. Noble was capable in a situation such as this, and did, act in an abrasive personal manner which escalated the situation, and with disregard of the personnel procedures he had been directed to and knew he should follow.

I assume a legitimate business reason for the February 20, 1987 Reprimands, based on the DPDO incident. However I find the level of the disciplinary actions taken would not have been taken but for and absent the cover-up letter, Complainant's protected activity.

I find from Noble's presentation there was no legitimate business reason for the Suspension Proposal and even if there were, it was so excessive to the circumstances and

done with such disregard for proper procedures, carelessness in determining authority, that clearly it was motivated solely by Pogue's cover-up letter, and it is so found.

Further even assuming Noble had a legitimate business reason for determining Pogue's performance in her noise assignments deficient as of January 16, 1987, and his January 22, 1987 Notice, I believe Noble's handling of this employee during the period she was to be afforded reasonable opportunity to improve is so totally colored by Noble's personal reactions, personal involvement, and lack of balance in handling such a supervisory situation, all flowing from Pogue's cover-up letter to the Commander, as Tatum indicated based on Noble's past history could occur, that the reasonable opportunity called for by the personnel procedures evidenced was in fact not provided. This period was so affected by pogue's reactions to the level of actions Noble elected to take, which as NX 59 warns Navy supervisors would do more harm than good; her time was so affected by the number of actions Noble elected to take, the meetings resulting, or called, flowing from this highly disparate handling when compared not only to Shipyard professionals but Shipyard-wide personnel over the years, that in effect there was no reasonable opportunity afforded Pogue to improve performance in a harassment-free work environment where the employee's

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attention could be focused on the task at hand.

Fisher testified that under the Shipyard's performance appraisal system and when a marginal rating is given, specific requirements as to what the employee must do to improve the rating must be given and either training or assistance given the employee to help them raise their performance. It was Fisher's opinion, based on his Shipyard experience in similar matters grieved over the years, that the appraisal system's requirements were not met in Code 106's handling of Pogue's January 22, 1987 unsatisfactory performance evaluation or the withholding of her within-grade increase.

Zodrow's opinion, based on his six years of Shipyard personnel office employment, is that Noble's January 22, 1987 corrective actions were appropriate because, in his opinion, Pogue's performance problems were caused in large part by her conduct. However, as with Tatum's understanding of Pogue's performance problems, these opinions are based on information which came from Noble alone, information which is biased and colored based on Noble's reactions to Pogue's cover-up letter. Zodrow's explanation indicates the speed with which Noble-Tatum elected to act under personnel procedures.

Additionally, from Noble's trial presentation viewed in conjunction with Tatum's testimony as to their December 3, 1986 discussions, and the performance documentation Noble memorialized after the work review meetings he held with Pogue beginning january 16, 1987, I believe that because of his reaction to the December 3, 1986 cover-up letter, Noble's handling of this employee in their performance review meetings was substantially affected by his pre-judgment. Tatum's December 3, 1986 fear of Noble's

inability to handle the situation, as indicated by the decisions Noble subsequently made, appears to have been well-taken.

When Noble advised Tatum and Pogue December 3, 1986 her work performance was deficient he did so despite the fact she had submitted the work products he agreed she could deliver in connection with the start of his noise assignment; and she had asked him for further directions in a field new to her, to which he had not been responsive. Less than 20 workdays had elapsed between November 4 or November 5, 1987, when he guided her to noise source references, and his December 3, 1986 work deficiency judgment. it is to be inferred, found and concluded that in so advising that day

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Noble's prime motivating factor was not Pogue's work performance to date and to December 3, 1986, but Noble's reaction to her "cover-up" December 3, 1986 letter and to her statements to him in october and November that he was playing politics with, and unconcerned about HW violations found on her audits. Tung had had a month to familiarize himself with his new job in a subject area in which he was an expert. To adjudge Pogue's noise job performance as he did December 3, 1986 on the stated basis and in the circumstances related above does not reflect it was based on reasonable nor legitimate business reasons but rather it reflects it was solely motivated by what I find he told Pogue December 3, 1986 he would do. He intended to rate her job performance deficient because she engaged in activities found protected here, she had charged him with a cover-up of hazardous waste violations in a "cover-up" letter to the Commander.

This was in fact the first notice to Pogue of noise assignment job deficiencies. Noble did not respond to Pogue's request for a December work review meeting and in less than 20 workdays after December 3, 1986 he testified he adjudged her work deficient having wiped from his consideration the pre December 3, 1986 period. (His written memorializations do not bear the latter out.) The temporal relationship of Noble's January 1987 unsatisfactory performance rating to his December 3, 1986 advice to Pogue and Tatum, his detailed testimonial explanation of her work deficiencies for this period and thereafter, as well as evaluation of his documentary memorializations, indicate prejudgment based on Noble's reaction to the cover-up letter was the prime motivating factor in his decisions. In all of Noble's work performance actions involving Pogue, January 16, 1986 and thereafter, this motivation was so integral and intimate that were there legitimate business reasons for Noble's work performance evaluations they are so colored by this continuing thread as to be inseparable.

Loyberg, with his 17 years of industrial noise conservation experience thought Pogue's assignment was a large task. He explained how long it would take him, with his experience, to come up with a "fix." Pogue's assignment as a trainee was three a day, which appears unreasonable to the circumstances. Pogue's self-study for certification to teach a night course was in a subject matter field related to her education, training and

experience. Noble himself stated October 29, 1986 formal training would follow, and so indicated on his December 12, 1986 training assessment.

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There was limited work time available to Pogue prior to january 16, 1987 and the meeting on which Noble's January 22, 1987 notice was based, with limited training afforded in a field new to Pogue. Even without considering the prejudgment factor which I believe permeates the work performance actions, weighing Noble's attestations as to what he expected of Pogue between December 3, 1986 and January 16, 1987, 15-25 engineering fixes a week, which I do not believe or find from the testimonial presentations including Loyberg's, and the work review documentation evidenced were generally as simple a task as the Navy's citations to the diagram illustrations of NX 69, pg. 724 would represent, I do not believe that the January 22, 1987 performance deficiency notice was legitimately business based. Further with its temporal relationship to Noble's December 3, 1986 statements to Pogue and Tatum, less than 20 workdays before, find it was primarily motivated by Pogue's December 3, 1986 cover-up letter and but for and absent her environmental whistleblowing this personnel action would not have occurred.

After Noble's January 16, 1987, January 22, 1987 deficiency decisions, Dr. Haberman wrote February 11, 1987 that with the amount of noise material in the study Pogue had to cover, and her difficulty in finding time to study, Pogue needed until March 1987 to complete the self-study material. This is not surprising given the number of personnel actions she and her union were involved in based on the personnel actions of January 9, 1987 through January 30, 1987. Additionally the flavor of abrasiveness and animosity reflected in Noble's notes to Pogue while she was under directions to measure up to his job performance expectations; his warnings not to take any leave; his work review memorializations to the effect she did submit work but he thought she was just copying, but Noble really did not know this and would have to ascertain comprehension through Dr. Haberman; his belief her work products were a "smoke screen" to avoid insubordination charges while Pogue pursued her legal and administrative remedies resulting from the number and level of personnel actions he elected to take against her beginning January 9, 1987, reflect a complete breakdown in effective communication, the absence of the purpose of the performance improvement notice Pogue had been placed under, according to Navy personnel instructions, to assist and motivate the employee to improve, as well as an emotionally charged work environment which was controlled and determined by Noble as the supervisor. It was not affordance of a reasonable opportunity to improve.

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My evaluation of the witnesses' presentation is that absent, and but for, the cover-up letter arising out of Pogue's HW inspector job the handling of this personnel action in this

fashion would not have occurred even were there a legitimate business reason for the performance deficiency notice which, on this record, I do not find there was. The final unsatisfactory evaluation, withholding of within-grade increase and involuntary transfer are all founded on Noble's December 3, 1986 and January 16, 1987 judgments, noticed formally January 22, 1987 and all tainted by retaliation for Pogue's environmental whistleblowing which I find was the prime motivation.

Thus for all adverse personnel actions as of January 20, 1987 and later resulting from this retaliation for her environmental whistleblowing activities relief, if jurisdiction is found, should be granted Complainant. Pogue knew of her non-selection for the Code 460 Environmental Engineer by Dr. Cornils' January 13, 1987 advice, NX 542, and her claim for relief based on this action is untimely.

The interests of judicial efficiency, whether or not jurisdiction under these Acts is found, required the above findings on all other issues.

*Jurisdiction*

Following full briefing it is now the Navy's position the employee protection provisions of the four separate environmental statutes at issue do not apply to aggrieved federal employees who whistleblow under these specific statutes and Pogue, as a federal employee, is not an employee under these Acts, and thus the Secretary of Labor lacks jurisdiction here under the environmental statutes at issue. The Navy further contends if it is assumed these Acts, the environmental statutes, apply to the parties here, by operation of the CSRA of 1978, 5 U.S.C. 1101 *et seq.*, the CSRA is the exclusive remedy for aggrieved federal environmental whistleblowers.

The CWA, 33 U.S.C. § 1367, was enacted in 1972; both the RCRA, 42 U.S.C. § 6971, and TSCA, 15 U.S.C. § 2622, were enacted in 1976 all prior to 1978, and the CSRA's passage in 1978. CERCLA, 42 U.S.C. § 9610, was enacted in 1980 and post-dates the 1978 enactment of the CSRA, 5 U.S.C. 1101 *et seq*.

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While the Navy's June 15, 1987 Pre-Trial Statement also proposed the federal government as a employer is not subject to the employee protection provisions of these Acts, this proposition is neither briefed nor seriously contended. The thrust of the Navy's Post-Trial Reply Brief is federal employees are not so governed, and if found governed, the CSRA preempts their applicability.

The language quoted above from these Acts as well as the further statutory language from RCRA, CERCLA, cited and recited in Complainant's Response Brief at pgs. 3-5, similar and comparable to the statutory language in the CWA which formed the basis for the Administrative Law Judge's finding of jurisdiction in *Conley v. McClellan Air Force Base*, 84-WPC-1, currently on appeal to the Secretary of Labor under the CWA;[12] with

the Environmental Protection Agency's implementing regulations for TSCA to similar effect, cited in Complainant's Response Brief and Complainant's cited EPA regulations implementing RCRA coverage for federal agencies, all make clear all four environmental protection statutes at issue, with their employee whistleblower reprisal provisions, apply to the federal government and federal facilities as "no employer" or "no person" within the quoted statutory language.

Further complainant's argument is persuasive that by the plain meaning of these quoted employee protection statutory provisions, of RCRA, CWA, TSCA and CERCLA, when it is respectively stated in each quoted section that no person or no employer shall discriminate against "any employee" in reprisal for the statutorially described environmental whistleblowing, the "any employee" language is neither general nor imprecise. These statutes clearly state the employees covered, and do not limit the "any" employees covered by these Acts' reprisal provisions.

Any in its usual meaning of any and every employee, affected in the manner set forth as a result of the environmental whistleblowing described in these Acts is subject to the employee protection provisions of each and all of the Acts at issue. Any employee is subject to these Acts' jurisdiction, including federal employees. Respondent cites to no authority in these Acts nor in the legislative history of these Acts which indicates an intention to exclude federal employees from their coverage. Further Respondent has cited to nothing in the post-1978 amendments to RCRA and CERCLA which would, in statutory language or legislative history, indicate Congressional intention these Acts did not apply

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to environmental whistleblowers who are federal employees notwithstanding the CSRA's 1978 enactment of 5 U.S.C. § 2302 (b)'s provisions, including 5 U.S.C. § 2302 (b)(8).

Mr. Refsell's testimony as well as the statutory language in each of these Acts, RCRA, TSCA, CWA and CERCLA, indicate how significant a factor federal facilities and their operations can be, and are, in the effective implementation of the provisions and Congressional stated purposes of these environmental statutes. Given the plain meaning of the statutory provisions at issue, it appears Respondent's argument these statutes do not, as enacted and by their language, apply to federal environmental whistleblower relies totally on its interpretation of legislative history remarks made in connection with the later 1978 enactment of the CSRA, a statute which at 5 U.S.C. § 2302(b)(8) sets forth what is here perceived as a generalized reprisal provision, a provision which makes no specific reference to environmental whistleblowing reprisals.

It is Respondent's argument, not Complainant's, the employee protection provisions of 42 U.S.C. § 5851 (b)(1), the Energy Reorganization Act of 1974 (ERA), are applicable to federal employees in the same manner as the Acts at issue here. By statutory analogy since there is a recited reference in the CSRA's legislative history to its reprisal protection

of the nuclear engineer who questions the safety of certain nuclear plants, Respondent argues this indicated Congress did not intend 42 U.S.C. § 5851 (b)(1) as enacted in 1974 nor, it is urged by similar view, the statutory language of the RCRA, CWA, TSCA, and CERCLA environmental whistleblower protections, to apply to federal employees.

Such a view would violate the plain and clear meaning of the statutory protection provisions at issue. Further the Complainant's Post-Trial Brief's citation and recitation at pg. 3 sets forth a more analogous statutory reference from the Clean Air Act, 42 U.S.C. § 7622, in keeping with the statutory language of RCRA, CWA, TSCA, AND CERCLA and an analogy not based on the Navy's conjecture from the later enacted CSRA. Like the ERA and the statutes at issue, the Secretary of Labor has jurisdiction to hear employee reprisal complaints, 29 C.F.R. Part 24, brought under the Clean Air Act, 42 U.S.C. § 7622 enacted in 1977. While neither the ERA nor the Clean Air Act is at issue here, the Clean Air Act, unlike ERA, is an environmental protection statute similar in

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purpose and provisions to RCRA, TSCA, CWA and CERCLA. Its Congressional history reflects 42 U.S.C. § 7622's protection of environmental whistleblowing was Congressionally stated to be "applicable, of course, to Federal, State or local employees to the same extent as any employee of a private employer."[13] The Clean Air Act's legislative history, specific for federal employee coverage, reflects what is clear on the fact of the statutes at issue, RCRA, TSCA, CWA and CERCLA. As "any employee" of these statutes as enacted, a federal employee is an employee subject to the protection of the whistleblower reprisal provisions of these four environmental protection statutes, RCRA, CWA, TSCA and CERCLA. It is so found and concluded.

If, as the Navy states, prior to the 1978 CSRA no meaningful internal protection for federal whistleblowers existed, and the provisions it relies on in the 1978 CSRA for its preemption argument were the first such protections federal whistleblower employees were afforded, this is all the more support for reading the clear statutory language of the Acts at issue (exclusive of CERCLA as this statute was not enacted until 1980) to mean what they state, any employee, which includes federal employee environmental whistleblowers.

It would appear the Navy's alternative argument that with the 1978 enactment of the CSRA, by the operation of statutory preemption, the CSRA became and is the exclusive statutory remedy for aggrieved federal employees who whistleblow under the environmental protection statutes at issue is more novel, pivotal of jurisdiction in this forum.

The Navy's argument is that under the principle of statutory preemption set out in *Brown v. GSA*, 425 U.S. 820, the CSRA of 1978, a precisely drawn detailed statute for the protection of federal whistleblowers preempted the more general remedies of the environmental protection statutes here, in RCRA, CWA, and TSCA. As to CERCLA,

enacted after 1978, the Navy's contention is similar-- its provisions protecting environmental whistleblowers do not apply to federal employees.

The Navy's view the 1978 Civil Service Reform Act when enacted 5 U.S.C. § 1110, *et seq*. was a more precisely drawn, detailed statute for the protection of federal environmental whistleblowers is based on its 5 U.S.C. § 1206 (a)(4)(E) provision, a provision

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which established the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) with the power to investigate reprisal claims for whistleblowing activities and to institute corrective action; based as well on its § 5 U.S.C. § 2302 (b)(8)(A)(i)(ii) and § 2302 (b)(8)(B)(i)(ii) specific prohibition of federal officials from taking adverse personnel actions in reprisal for disclosure including disclosure to the OSC, the agency's Inspector General or agency head, of information which a employee reasonable believes evidences "a violation of any law, rule or regulation," irrespective of whether an actual violation of law, rule or regulation existed; with its specific 5 U.S.C. § 2302 (b)(8) prohibition of reprisal for disclosure of information an employee reasonably believes evidences "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety or health." The Navy contends further, as part of the highly specific, structured remedies available to Complainant under the CSRA, preempting under the *Brown* principle redress under these environmental statutes, her 5 U.S.C. § 7121 (d) right to seek redress for retaliation under her union's negotiated grievance procedure for whistleblowing as a 5 U.S.C. § 2302 (b)(8) prohibited personnel practice.

The Navy also contends the CSRA in its very language at 5 U.S.C. § 2302 (d), where it is stated the prohibited personnel practices of 5 U.S.C. § 2302(a) shall not be construed to extinguish or lessen any right or remedy available to an employee, itemized in 5 U.S.C. § 2302 (d),[14] i.e., laws which remained unaffected by the 1978 CSRA's enactment, an itemization which does not include any of the four environmental protection statutes under which this Complaint is brought here; and in its stated 5 U.S.C. § 2305 coordination with other laws among which the environmental protection laws here, RCRA, TSCA, CWA and CERCLA are not recited; such very language in the 1978 CSRA evidenced Congressional intent to preempt for federal employees the environmental whistleblower protections of the RCRA, TSCA, CWA and CERCLA by operation of the principle of statutory preemption, *Brown supra*, if in fact such remedies were available to federal employees prior to the 1978 CSRA.

The Navy's position is Congress having legislated to the degree it did in the CSRA as to federal whistleblowers, the statutory remedies generally available to non-federal, private sector employees under the environmental whistleblower protections

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of RCRA, CWA, TSCA and CERCLA were preempted, in effect repealed as to federal employers. A federal employee's sole remedy for environmental whistleblowing under RCRA, CWA, TSCA and CERCLA now lies in the CSRA. Thus the Navy contends the Secretary of Labor has no jurisdiction to consider an appropriate remedy under the CSRA and only the OSC and MSPB have such jurisdiction.

In *Brown v. General Services Administration*, 425 U.S. 820 1976), a federal employee who alleged racial discrimination had resulted in his non-selection for promotion by GSA filed a complaint in federal district court under Title VII of the 1964 Civil Rights Act as amended and applied to federal employees in 1972, as well as the Declaratory Judgment Act 28 U.S.C. § 2201 and the 1866 Civil Rights Act, 42 days after final agency decision rather than within the 30 days for filing civil suit set forth in the amended 1964 Civil Rights Act, § 717 (c), 42 U.S.C. § 2000 e-16(c)(1970 ed. and Supp. IV). The Supreme Court upheld the dismissal of his complaint on the basis § 717 of the 1964 Civil Rights Act was the exclusive individual remedy available to a federal employee complaining of job-related racial discrimination and under § 717(c)'s 30-day requirement his action was untimely.

The respondent's statutory preemption argument is viewed against the Congressionally stated purposes of the specific statutes here at issue, their whistleblower protection sections it is urged the CSRA, and its redress procedures, preempted as to federal employees. Congressional purpose in enacting each of the statutes at issue was to ensure all facilities generating the environmental hazards these Acts set forth were subject to and abided by their provisions. Congress' stated purposes in these Acts and their provisions indicated the very precise and detailed degree to which it intended to legislate in very specific areas impacting on environmental protection given the significant environmental concerns Congress expressed.

Congressional concern the particularized environmental protections requirements of its specific and precise legislation be swiftly and independently enforced is reflected in these Acts' specific environmental whistleblower protection provisions. In furtherance and effectuation of these purposes, these Acts included the very detailed specific environmental whistleblower reprisal sections, 42 U.S.C. § 6971, 15 U.S.C. § 2622, 33 U.S.C. § 1367, and 42 U.S.C. § 9610 under which employees who believe they have been retaliated against in any condition of their employment because of

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the detailed and specific whistleblowing activities these Acts protect can seek redress through the Secretary of Labor.

In considering the Navy's CSRA preemption argument here, complainant has been found to have whistleblown as to the Shipyard's violations of the environmental

protection Acts at issue not only internally, in her SRs and to the Shipyard Commander, but she whistleblew under these environmental protection statutes RCRA, TSCA, CWA and CERCLA to the State investigatory agency and inspector, then intimately and personally involved with Deputy State Attorney General Soto in the pending enforcement litigation against the Shipyard for violations of the environmental protection statutes at issue. Her whistleblowing provided helpful and useful information to the State in its enforcement action and the shipyard's retaliatory personnel actions found above followed not only her cover-up letter to the Commander, but followed her State contacts, contacts known to the Shipyard.

State inspector Refsell's testimony indicated the extent to which, in his area of responsibility, federal facilities are subject to these Acts' provisions, for the implementation of which reliance rests in large measure on facility self-effectuation, and self-monitoring. He attested also to his access problems at a federal facility. It is to be inferred from the entire presentation here, the federal Government in its various nationwide facilities is an employer or person significantly involved with and responsible for the activities Congress was particularly concerned with in the preambles and provisions of the environmental protection statutes here. Federal employees at these facilities, privy to information relevant and significant to the administration and enforcement in formal proceedings and/or inspections under RCRA, CWA, TSCA and CERCLA, which in the State's several enforcement actions here Complainant's was, federal employees less reticient than was Mr. Lee's personal policy in dealing with inspectors/enforcement action investigations, can in significant measure fall under the very detailed and specific whistleblowing activities of 42 U.S.C. § 6971, 15 U.S.C. § 2622, 33 U.S.C. § 1367 and 42 U.S.C. § 9610.

On the Navy's preemption argument it would appear Complainant is correct in her assertion the CSRA makes no reference direct nor indirect to any of the four environmental whistleblower provisions at issue here. None of the cases Respondent argues as support for its positions has decided the issue of whether the whistleblower

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protection provisions of RCRA, TSCA, and CWA were preempted by the CSRA.

Further 5 U.S.C. 2302 (b)(8) includes no language nor statement referable to environmental law violations. Its language is generalized, "reprisal for a disclosure of information" as to a violation of any law, rule or regulation which, as held in *Barnhart v. Devine*, 777 F.2d 1515 must be one implementing and directly concerning merit system principles; and additionally its "substantial and specific danger to public health and safety" omits any specific reference to the environment. Further as testimony here indicated what are substantial and specific hazardous waste violations of RCRA, TSCA, CWA and CERCLA may, in the "eye" of the facility, operators and responsible parties not be substantial nor significant, but constitute violations of concern to administrative and enforcement officials under these Acts, for which civil suit is filed.

The facts on which *Brown* is based appear far different than those existing on a comparison of the CSRA including its provision argued preemptive, 5 U.S.C. § 2302, 2302(b)(8), with the specific detailed provisions of 42 U.S.C. § 6971 (RCRA), 15 U.S.C. § 2622 (TSCA), 33 U.S.C. § 1367 (CWA); a comparison of the overall CSRA provisions with the overall provisions of the environmental protection statutes at issue, statutes in effect prior to the federal government's 1978 CSRA personnel reorganization; statutes which in their environmental whistleblower protestions then applied to federal employees.

In the environmental areas in which these statutes legislated they are detailed, precisely and comprehensively drawn for the particular area in which Congress legislated, Congress' specific and particular concern at enactment of the comprehensive remedial schemes of these Acts, individually and together, being environmental protection. To ensure effectuation of these purposes, the whistleblower protection provisions of 42 U.S.C. § 6971, 15 U.S.C. § 2622, 33 U.S.C. § 1367, and 42 U.S.C. § 9610, 29 C.F.R. Part 24, provided the environmental whistleblower protected by these Acts with immediate access to an investigative agency independent of, and outside the employer/person charged with retaliation, the Department of Labor's Administrator who is mandated under enabling 29 C.F.R. Part 24 regulations with making a swift determination. As a matter of right, this determination is then directly appealable to a fact-finding, 5 U.S.C. § 3105

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Administrative Law Judge who must hear the matter on the record in accord with the 5 U.S.C. § 554 and make an expeditious recommended decision for the Secretary.[15] The Secretary then must also reach a decision within the speedy time frames of 29 C.F.R. Part 24, with the right to judicial review by the Circuit Court where the standard of review is substantial evidence to support the Secretary of Labor's decision. While as Respondent argues comparison of the adequacy of CSRA and OSC remedies may not be significant to determining the pre-emption question, these are the facts as to the complaint procedure under these environmental whistleblower statutes and in determining whether Congress in enacting the CSRA intended greater protections for federal environmental whistleblowers under RCRA, TSCA and CWA or preempted these Acts' provisions as to federal employees by § 5 U.S.C. 2302(b)(8) such background does not appear irrelevant.

The preempting statute in *Brown* stemmed from Congressional concern federal employees' past history indicated ineffective administrative redress for job discrimination and inability to engage the judicial mechanism for adequate redress. The compactly stated Civil Rights Act legislation at 42 U.S.C. 2000 e-16, § 717, a detailed, balanced, complete, complementary administrative and judicial enforcement process, including annual agency equal employment opportunity plans, was held to be designed and crafted and narrowly tailored to eradicate and remedy discrimination in federal employment.

This is not what review of CSRA and the generalized, limited whistleblower anti-discriminatory provisions of the CSRA, § 2302 and § 2302(b)(8) 5 U.S.C. reflect this

legislation to be. It is not perceived, as the Navy urges, that Congress enacted the CSRA primarily for federal employees' protection and that the procedural schemes of the CSRA urged as preemptive here were intended for the protection of environmental whistleblowers. Congress in 1978 in connection with its reforms of the executive branch's operation and management of its workforce revamped its personnel system by an extensive statute and in doing so legislated concerning internal whistleblower reprisals in the federal workforce by what is here viewed as the generalized prohibited personnel practice language of § 2302(b)(8), with the Office of Special Counsel (OSC) of the MSPB having the discretionary investigatory and determination authority. Such does not persuade the CSRA legislation and these provisions were intended by Congress to preempt the more detailed,

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specific, complete and encompassing environmental whistleblower protections of RCRA, TSCA, and the CWA.

The fact is in accomplishment of the specific purposes detailed in each of these environmental protection Acts at issue Congress set forth in a far more detailed precise manner than the csRA the specific employee activities under these Acts which would be held protected from retaliatory discrimination with the actionable discriminatory actions far more encompassing than the prohibited personal actions of the CSRA.

The CSRA whistleblower protection provisions are not detailed, complete and encompassing. In this action, as may be so in any environmental whistleblower complaint under these Acts, not all the claimed retaliatory actions meet the 5 U.S.C. § 2302(a)(1)(2) "prohibited personnel practices" definitions afforded the CSRA's generalized whistleblower protections of § 2302. The OSC's actions on such complaints are discretionary, on a judicial review its determinations subject only to the standard of insuring compliance with the statutory requirement OSC perform an adequate inquiry. 5 U.S.C. § 1201 et seq.[16]

It also appears there can be actions taken in the federal workplace for which an employee would have no redress under either OSC, agency grievance procedures, nor union negotiated agreements, including admonishments, but would be subject to the protection provisions of these Acts, all-encompassing in their discrimination language. A federal employee's avenue of redress through the OSC, agency grievance procedures, or through collectively bargained negotiated grievance procedures does not either through the language of the CSRA or in its remedies legislate in the area of environmental whistleblowing to the extent and for the purposes set forth in RCRA, TSCA, and CWA.

Complainant urges most whistleblowing is not environmentally related. Her contention Congress' general statements at § 2302 as to federal whistleblower retaliation was not addressing the narrow concerns of the whistleblower protection provisions of RCRA,

TSCA, CWA and CERCLA essential to the administration and implementation of these Acts' very specific environmental concerns appears well-taken.

On review of the Navy's case authorities for their preemption contention, particularly *Carducci v. Regan* 714 F.2d 171 (D.C. Cir.

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1983), *Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986) where federal employees sued under the Administrative Procedures Act and the Reconstruction Civil Rights statutes respectively, Complainant urges and I agree, these cases were decided based on the CSRA's relationship to broad remedies in general statutes under which, prior to CSRA, federal employees sought redress for perceived inadequacies of the federal merit system. Such decisions are not controlling in reaching a decision under these Acts' provisions, more precise than the CSRA, enacted for very specific purposes.

Since none of the actions taken in retaliation for Complainant's environmental whistleblowing under RCRA, CWA, TSCA and CERCLA reach the level of an appealable adverse action if the Respondent's CSRA's preemption position is correct as the internal grievance procedures are understood were Complainant not subject to the union's negotiated grievance agreement the employing retaliating agency would have the last word on her grievances; there would be no right of appeal to the MSPB. Under the negotiated union agreement it would appear it is the union's decision as to whether to appeal beyond the Shipyard/facility.

All this impresses as chilling and ominous to the Congressional purposes for which these environmental statutes were enacted, as did Mr. Tatum's testimony he never even considered in his appeal review of the personnel action before him that retaliation could be a factor. Decision-making apparently can rest with the employer's agents charged as the reprisers, with factual investigation required discretionary, with total acceptance of the first-line supervisor's representations, no cross-examination, and layers of appeal before the employee's complaints are heard outside the involved facility.

Since not persuaded it was Congress, intent on enactment to exclude federal employees from these Acts' whistleblower protections, Congressional purposes in enacting these Acts and the preciseness and specificity of the environmental protection legislation at issue, the details of its whistleblower protection when compared with the CSRA provisions has been considered on the Navy's preemption contention. There is an absence of any clearly stated Congressional intent to repeal as to federal employees the whistleblower protections of the specific environmental protection Acts here at issue, with no citation of Congressional consideration of these environmental whistleblower protections when the CSRA was subsequently enacted but only the isolated legislative reference to

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a nuclear engineer at a nuclear plant from Respondent's cited Congressional source; and the perception these statutes and the CSRA are not entirely irreconcilable. It thus cannot be found and recommended to the Secretary as the Navy urges, that the detailed and precise basis for an environmental whistleblowing employee's protection against reprisals of 42 U.S.C. 56971, 15 U.S.C. 52622, 33 U.S.C. § 1367 were as to federal employees, repealed or preempted by 5 U.S.C. § 1101.

The specific protections afforded in and legislated under the specific whistleblowing protections of RCRA, TSCA, CWA and CERCLA are not for workplace discrimination resulting from personnel practices which the aggrieved employee claims disadvantaged him in job assignments, ratings, wages, job performance, etc. but such actions resulting from his participation in administrative and enforcement proceedings vital to the implementation and effectuation of the specific and detailed purposes and provisions of RCRA, TSCA, CWA and CERCLA which in their impact effect the lives and living environment of all this nation's inhabitants. For their specific areas RCRA, TSCA, CWA and CERCLA are very precise and detailed, as are the whistleblower protection rights these statutes afford the individuals vital to their enforcement.

It is therefore found, concluded, and recommended to the Secretary that the Mare Island Naval Shipyard is an employer subject to the jurisdiction of the 42 U.S.C. § 6971 of RCRA, 33 U.S.C. § 1367 of the CWA, 15 U.S.C. § 2622 of the TSCA and 42 U.S.C. § 9610 of the CERCLA, and Complainant has so established.

It is further found, concluded, and recommended to the secretary that Complainant as an employee of the Shipyard under the specific statutory language and provisions of each of the sections of these four Acts at issue set out above earlier meets the definition of an employee subject to the whistleblower protections of these environmental statutes, 42 U.S.C. § 6971 of the RCRA, 15 U.S.C. § 2622 of TSCA, 33 U.S.C. § 1367 of CWA, and 42 U.S.C. § 9610 of CERCLA.

In accordance with the above findings of fact and resulting conclusions of law,, the following recommended ORDER is issued.

**RECOMMENDED ORDER**

Respondent Mare Island Naval Shipyard shall take the following

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actions to abate the violations:

1) Remove from Barbara Pogue's personnel file and destroy the February 20, 1987 Letters of Reprimand of Michael Noble and Carroll Tatum, and all personnel documents related to the Suspension and Proposal to Suspend issued by Michael Noble.

2) Remove from Barbara Pogue's personnel file and destroy all the Unsatisfactory Work Performance Evaluations issued while she was in Code 106, including those of January 22, 1987, March 31, 1987, and April 10, 1987.

3) Abate and terminate any further personnel actions against Barbara Pogue based on these adverse personnel actions.

4) Take immediate necessary action to effectuate Pogue's within-grade increase as of the date it would have been due.

5) Remove all indications and destroy all indications in Barbara Pogue's Official Personnel File which reflect that her transfer out of Code 106 was due to performance or conduct deficiencies.

6) Ensure that the engineering position she now holds provides the same promotional potential as that held in Code 106, and ensure she is provided all necessary training to satisfactorily perform in that position.

7) Pay to Pogue's counsel reasonable legal fees and costs based on their representation in action under these Acts.

Complainant through counsel is ordered within 20 days of the above date to file her documented fee petition and bill of costs with this Office, with proof of service on Respondent.

Respondent then has 20 days thereafter to file any comments/objections with this Office. Thereafter a further fee award/costs recommended Order will issue.

ELLIN M. O'SHEA
Administrative Law Judge

EMO:mm

**[ENDNOTES]**

[*]Energy Reorganization Act, 42 U.S.C. § 5851 is not involved in, nor a basis for Complaint here.

[1]Referred to as RCRA, for its Resource Conservation and Recovery Act title as this is the acronym agreed to and used for this Act. All four Acts under which this action is brought are referred to herein as "the Acts" or "these Acts."

[2] Referred to as CWA, as counsel do.

[3] The Navy had earlier indicated, anticipating complainant's 5/11/87 motion to Amend, there was a lack of the required § 24.4 29 C.F.R. investigation and determination on these additional averred retaliatory acts by the Department of Labor's Administrator. 5/2/87 Navy's Dismissal Motion Reply Brief, p. 4, fn 5.

[4] Following trial, the 7/22/87 Order to the Dept. of Labor/Solicitor was issued to which the Associate Solicitor responded 8/27/87, both documents incorporated. The 9/1984 recommended decision in *Conley v. McClellan Air Force Base*, 84-WPC-1, which held a federal career employee is subject to the Dept. of Labor's jurisdiction under the whistleblower protection provisions of the WPCA is on appeal before the Secretary, the finding on the discrimination issue unfavorable to complainant. Operating agencies of the Department of Labor continue to investigate and process federal employee complaints, finding jurisdiction under WPCA and the Acts at issue here.

[5] In citing to Exhibits, "C" or "CX" refers to Complainant's Exhibits, "N" or NX" the Navy's Exhibits. The numbers used in this reference citation may be either the actual Exhibit No. the parties used and tabbed, or the pagination numbers the parties used in their respective volumes.

[6] See also CX 73 U.S. EPA investigative report to Ralph Lee of Shipyard re referral of EPA reports to State.

[7] 7/17/85 instruction set up HW Oversight Project Engineer (Thompson) position.

[8] Generally stated and not inclusive for each.

[9] This record would indicate even if Pogue had eight work days available during the 10/28/87 - 11/7/86 period to devote her time exclusively to this assignment as written, which she did not, with her lack of experience in the area and lack of supervisory direction until 11/4 or 11/5/86, the due date was unrealistic.

[10] Since occupational hearing loss claims under 33 U.S.C. § 908(c) (13) are heard in this forum, the lack of triviality of occupational noise control can be well-appreciated.

[11] Further, no statement in this decision should be viewed as the belief or finding of the undersigned that a cover-up occurred, or that any of Pogue's perceptions were a correct reflection of the facts.

[12] *Mc Allen v. Environmental Protection Agency*, 86-WPC-1, 11/28/86 was, pending appeal, settled before any decision was issued by the secretary. The employee in *Ford v. Secretary of Labor*, 700 F.2d 281 where the issue of jurisdiction was not raised appears subject to some laws applicable to federal civilian employees.

[13] Cited as from H.R. Rep. No. 294 95th Cong., 1st Sess. 326.

[14] The Statutes listed in 5 U.S.C. § 2302 (d) are:

> (1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;
> (2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;
> (3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;
> (4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping conditions; or
> (5) the provisions of any law, rule, or regulations prohibiting discrimination on the basis of marital status or political affiliation.

[15] Notwithstanding the circumstances resulting in delay here, at this Office, cases heard under 29 C.F.R. Part 24 are administratively directed to receive the highest priority to disposition.

[16] Notwithstanding the Navy's quoted language from *Barnstadt supra*, review of the court's comments on OSC's fulfillment of its responsibilities under Chapter 12, 5 U.S.C. in the various cited cases would give pause to the federal environmental whistleblower seeking redress through OSC for violations under RCRA, TSCA, CWA and CERCLA; nor would the time period involved to decision, *Spagnola v. Mathis*, 809 F.2d 18 hearten.